85-1360

No. _____

Supreme Court, U.S.
FILED
FEB 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and LOCAL 759 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, SYSTEM COUNCIL U-4,

Petitioners,

v.

SALLY HECHLER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

LAURENCE J. COHEN
(Counsel of Record)
ELIHU I. LEIFER
RICHARD M. RESNICK
Suite 801
1125 15th Street, N.W.
Washington, D.C. 20005

ALLAN M. ELSTER
Suite 204
Point East Professional Bldg.
17971 Biscayne Blvd.
North Miami Beach, Florida 33160
Attorneys for Petitioners

Of Counsel:
LAURENCE GOLD
DAVID M. SILBERMAN
815 16th St., N.W.
Washington, D.C. 20006

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

A. Does § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, under the Supreme Court's decision in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. ——, 105 S.Ct. 1904 (1985), preempt a state tort law from defining the legal consequences of entering into a duty by virtue of a collective bargaining agreement?

B. Does the federal duty of fair representation preempt state law from imposing additional duties on an exclusive bargaining representative with respect to the manner in which a union performs its functions as bargaining representative?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOKED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	11
APPENDIX A	1a
APPENDIX B	11a
APPENDIX C	33a
APPENDIX D	35a

TABLE OF AUTHORITIES

Cases	Page
Allis Chalmers Corp. v. Lueck, 471 U.S. ——, 105 S.Ct. 1904 (1985)	5, 7, 8, 9, 10
Avco Corp. v. Aero Lodge 735, 390 U.S. 557 (1968)	8
Brooks v. New Jersey Manufacturers Ins. Co., 170 N.J. Super. 20, 405 A.2d 466 (1979)	6
Bryant v. Mine Workers, 467 F.2d 1 (6th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973)	6
Burgess v. Allendale Mut. Ins. Co., 111 LRRM 2997 (S.D. Ga. 1982)	6
Carollo v. Forty-Eight Insulation, Inc., 252 Pa. Super. 422, 381 A.2d 990 (1977)	6
Condon v. Steelworkers Local 2944, 683 F.2d 590 (1st Cir. 1982)	6, 11
Dunbar v. Steelworkers, 602 P.2d 21 (Idaho 1979), *cert. denied*, 446 U.S. 983 (1980)	6
Franchise Tax Board v. Laborers Vacation Trust, 463 U.S. 1 (1983)	8
Gerace v. Johns-Manville Corp., 95 LRRM 3282 (Pa. Ct. C.P. 1977)	6
Globig v. Johns-Manville Sales Co., 486 F. Supp. 735 (E.D. Wis. 1980)	6
Hartsfield v. Seafarers Int'l. Union, 427 F. Supp. 264 (S.D. Ala. 1977)	6
Hechler v. International Brotherhood of Electrical Workers, AFL-CIO, 772 F.2d 788 (11th Cir. 1985)	1, 4, 5
Helton v. Hake, 564 S.W.2d 313 (Mo. Ct. App. 1978), *cert. denied*, 439 U.S. 959	6
Higley v. Disston, 92 LRRM 2443 (Wash. Super. 1976)	6
House v. Mine Safety Appliances Co., 417 F. Supp. 939 (D. Idaho 1976)	6
Mahoney v. Chicago Pneumatic Tool Co., 111 LRRM 2839 (W.D. Mich. 1982)	6
McCogan v. Mine Workers, 124 Ill. App.3d § 25, 464 N.E.2d 1166 (1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 1752 (1985)	6

TABLE OF AUTHORITIES—Continued

	Page
Michigan Mutual Insurance Co. v. Steelworkers, 774 F.2d 104 (6th Cir. 1985)	7, 9, 10
Pockalny v. Elwell Parker Elec. Co., 608 F. Supp. 570 (W.D. N.Y. 1985)	6
Presidler v. Steelworkers, No. N-83-159 (D. Conn., Feb. 24, 1984)	6
Rawson v. Steelworkers, No. 17694 (Idaho Dist. Ct., Nov. 1, 1983)	6
Steelworkers v. Warrior & Gulf Co., 363 U.S. 574 (1960)	5
Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962)	8
Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957)	8
Vaca v. Sipes, 386 U.S. 171 (1967)	11
Wilson v. United Mine Workers, Civ. No. 78-G-1362-S (N.D. Ala. June 3, 1980)	6
Statutes	
Labor Management Relations Act, Section 301, 61 Stat. 156, 29 U.S.C. § 185	2, 4, 8
Other	
Bureau of National Affairs, *Basic Patterns in Union Contracts* (10th ed. 1983)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. _____

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and LOCAL 759 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, SYSTEM COUNCIL U-4,

Petitioners,

v.

SALLY HECHLER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The International Brotherhood of Electrical Workers, AFL-CIO, and Local 759 of the International Brotherhood of Electrical Workers, AFL-CIO (hereinafter "Unions"), hereby petition for a writ of *certiorari* to the Court of Appeals for the Eleventh Circuit, enabling this Court to review the Eleventh Circuit's judgment in *Hechler v. International Brotherhood of Electrical Workers, AFL-CIO*, 772 F.2d 788 (11th Cir. 1985).

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida is unreported. The opinion is reprinted as Appendix A to this petition. The opinion of the United States Court of Appeals for the Eleventh

Circuit is reported at 772 F.2d 788, and is reprinted as Appendix B to this petition. The order of the Court of Appeals denying rehearing is reprinted as Appendix C to this petition.

JURISDICTION

The opinion and judgment of the Court of Appeals were issued on September 30, 1985 (Appendix B, *infra*). A timely petition for rehearing was denied on November 14, 1985 (Appendix C, *infra*). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOKED

Section 301 of the Labor Management Relations Act (61 Stat. 156, 29 U.S.C. § 185) provides in pertinent part as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Sally Hechler was at all times relevant herein employed by Florida Power and Light Co. ("Florida Power"). Her complaint in this case—the allegations of which must be assumed to be true for purposes of this petition—alleges that in January, 1982, she "was assigned by Florida Power to work at an electrical substation, operated by said Florida Power . . . ." The complaint further alleges that Hechler was "permanently injured when she came into contact with highly energized components . . . while working in said substation for Florida Power . . ." (Complaint ¶¶ 5, 7; Appendix D).

Because of the Florida workers' compensation law, Hechler had no right to sue her employer for damages for the injury she suffered in the course of her employment. Instead, Hechler sued her Local and International Unions, petitioners herein. The legal theory of the complaint was that "pursuant to contracts" between the Unions and Florida Power, the Unions assumed certain safety-related duties and that the Unions were "negligent" in performing those duties. Specifically, the complaint alleged:

> The Defendants, and each of them, pursuant to contracts, and agreements entered into by and between these said Defendants and the said Florida Power, to which contracts and agreements the Plaintiff was a third-party beneficiary, and pursuant to the relationship by and between the said Defendants and the Plaintiff whereby the Plaintiff, SALLY HECHLER, was a dues-paying member of the said Defendants, the Defendants owed the Plaintiff the duty to assure that the Plaintiff was provided safety in her work place and a safe work place, and further, the Plaintiff would not be required or allowed to take undue risks in the performance of her duties which were not commensurate with her training and experience or to work in an area which was not safe as commensurate with her training and experience.
>
> • • • •
>
> Your Plaintiff, SALLY HECHLER, did not have the necessary nor required training, background, education, or experience to work in such an inherently dangerous work place as an electrical substation, but, despite this, the Defendants, and each of them, breached their duty and were consequently negligent to your Plaintiff, SALLY HECHLER, by allowing her to be assigned to work in and allowing her to actually work in such a dangerous location and environment and by failing to provide her with or ascertaining that she had the necessary training, experience, background, and education to work in such

> a dangerous environment, or ascertaining prior to her employer, Florida Power, placing her in such a dangerous environment, that she received the necessary education, background, training, and experience. Further, the Defendants were further negligent when they did not take any actions to protect your Plaintiff, SALLY HECHLER, from the risks inherent in such an inherently dangerous environment by providing and/or enforcing safety rules, regulations and requirements which would preclude such persons with inadequate and insufficient background, training, education, and experience, such as the Plaintiff, SALLY HECHLER, from being placed in such an inherently dangerous working environment, such as an electrical substation.

(Complaint ¶¶ 4,6; Appendix D.)

The Unions removed the action to federal court and thereafter moved to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court granted that motion, reasoning that plaintiff's claim was perforce a claim for breach of the federal duty of fair representation and that such claims are barred by the six-month statute of limitations contained in 29 U.S.C. § 160(b).

On appeal, the Eleventh Circuit reversed the judgment of the district court. The appellate court concluded that the complaint "states a common law negligence claim that may be cognizable in state courts and is not preempted by the federal labor laws." 772 F.2d at 790-791. In reaching this conclusion, the court reasoned that even though the collective bargaining agreement between the Unions and Florida Power "may be of use in defining the scope of the duty owed," *Id.* at 794, and even though the "state action may in part involve the same relief available under § 301" of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, *Id.* at 793, nonetheless respondent was free to pursue an action under state tort law, because "nothing in § 301 . . . provides the

plaintiff with the full measure of damages available in tort." *Id.* And the Eleventh Circuit was of the view that plaintiff's state-law claim would not "run afoul of the Supreme Court's recent pronouncement in *Allis-Chalmers Corp v. Lueck*, —— U.S. ——, 105 S.Ct. 1904, 85 L.Ed. 2d 206 (1985), where the Court stated: '[W]hen resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, . . ., or dismissed as preempted by federal labor-contract law." *Id.*

REASONS FOR GRANTING THE WRIT

THERE IS A SQUARE CONFLICT BETWEEN THE CIRCUITS AS TO WHETHER § 301 PREEMPTS A STATE ACTION FOR NEGLIGENCE IN PERFORMING A COLLECTIVELY-BARGAINED OBLIGATION TO PROVIDE SAFETY SERVICES

This case presents in a different context a question this Court explored for the first time last Term in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. ——, 105 S.Ct. 1904 (1985): are employers and unions to be held to a state-law or a federal-law standard of care with respect to the performance of duties created solely by virtue of a collective bargaining agreement? With respect to ordinary commercial contracts, state tort law operates freely to regulate the manner in which contractual obligations are discharged, and thus to determine the legal consequences of assuming a particular contractual duty. But the collective bargaining agreement, as this Court repeatedly has reminded, "is more than a contract," it is "an effort to erect a system of industrial self-government." *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 579-580 (1960). And defining the limits on state power to impose state-law consequences on those who undertake certain duties pursuant to a collective bargaining agreement is essential to the proper function of the

collective bargaining system extensively regulated by the federal laws that enunciate the national labor policy.

The issue presented here, then, is both an important one and one that frequently recurs. In particular, in recent years the issue of state regulation of collectively-bargained obligations has arisen with great frequency in the context involved here, *viz.*, state regulation of a union's performance of a collectively-bargained duty to provide safety services. Over 55% of collective bargaining agreements covering manufacturing employers contain provisions establishing a joint labor-management safety committee.[1] Because of the limitations created by workers compensation laws in such workplaces it has become almost commonplace, when a worker is injured, for the worker to sue his union in an attempt to recover damages that cannot be recovered from the employer.[2]

---

[1] Bureau of National Affairs, *Basic Patterns in Union Contracts* (10th ed. 1983).

[2] *See, e.g., Condon v. Steelworkers Local 2944*, 683 F.2d 590 (1st Cir. 1982); *Bryant v. Mine Workers*, 467 F.2d 1 (6th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973); *Pockalny v. Elwell Parker Elec. Co.*, 608 F. Supp. 570 (W.D.N.Y. 1985); *Presidler v. Steelworkers*, No. N-83-159 (D. Conn., Feb. 24, 1984); *Burgess v. Allendale Mut. Ins. Co.*, 111 LRRM 2997 (S.D. Ga. 1982); *Mahoney v. Chicago Pneumatic Tool Co.*, 111 LRRM 2839 (W.D. Mich. 1982); *Wilson v. United Mine Workers*, Civ. No. 78-G-1362-S (N.D. Ala., June 3, 1980); *Globig v. Johns-Manville Sales Co.*, 486 F. Supp. 735 (E.D. Wis. 1980); *Hartsfield v. Seafarers Int'l. Union*, 427 F. Supp. 264 (S.D. Ala. 1977); *House v. Mine Safety Appliances Co.*, 417 F. Supp. 939 (D. Idaho 1976); *Brooks v. New Jersey Manufacturers Ins. Co.*, 170 N.J. Super. 20, 405 A.2d 466 (1979); *Helton v. Hake*, 564 S.W.2d 313 (Mo. App. 1978), *cert. denied*, 439 U.S. 959; *Dunbar v. Steelworkers*, 602 P.2d 21 (Idaho 1979), *cert. denied*, 446 U.S. 983 (1980); *Rawson v. Steelworkers*, No. 17694 (Idaho Dist. Ct., Nov. 1, 1983); *Carollo v. Forty-Eight Insulation, Inc.*, 252 Pa. Super. 422, 381 A.2d 990 (1979); *Gerace v. Johns-Manville Corp.*, 95 LRRM 3282 (Pa. Ct. C.P. 1977); *Higley v. Disston*, 92 LRRM 2443 (Wash. Super. 1976); *McCogan v. Mine Workers*, 124 Ill. App.3d § 25, 464 N.E.2d 1166 (1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 1752 (1985).

The court below held that the states may regulate the performance of a collectively bargained duty to provide safety-related services. As we show, that holding is in square conflict with the decision of the United States Court of Appeals for the Sixth Circuit in *Michigan Mutual Insurance Co. v. Steelworkers*, 774 F.2d 104 (6th Cir. 1985), and is inconsistent with this Court's recent decision in *Allis-Chalmers v. Lueck*, *supra*.

1. *Michigan Mutual* involved a claim that is analytically indistinguishable from the claim in the instant case. As described by the Sixth Circuit, the complaint in *Michigan Mutual* alleged that the "Union had agreed by virtue of its collective bargaining agreement with [the employer] to perform safety services for its members; that Michigan law imposed a duty to exercise reasonable care in performing these services; that the Union breached this duty by its simple negligence; and that the Union's negligence proximately caused the injuries to [the employees]." 774 F.2d at 105. The district court dismissed that claim, and the Sixth Circuit affirmed, stating, in direct conflict with the decision below, that the claim is "*preempted by § 301 of the LMRA*". *Id.* at 106 (emphasis added).

In reaching that conclusion, the Sixth Circuit read *Allis-Chalmers v. Lueck*, *supra*, in a manner diametrically opposite to the way the Eleventh Circuit read *Allis-Chalmers* in deciding this case. Whereas the court below found that "[t]he difference between *Allis-Chalmers* and the instant case is easily seen," the Sixth Circuit concluded that *Michigan Mutual* and *Allis Chalmers* are indistinguishable and that plaintiff's claim in *Michigan Mutual* is "definitely foreclosed by the Supreme Court's decision in *Allis-Chalmers*," 774 F.2d at 105. The Sixth Circuit explained that in *Allis-Chalmers* "the Supreme Court confirmed that federal labor laws have preempted claims such as that brought by Michigan Mutual in the present case." *Id.* at 104. Thus both in reasoning and result *Michigan Mutual* and the instant case could not be more divergent.

2. The Sixth Circuit's decision represents the correct understanding of the preemptive force of § 301 and the proper reading of *Allis Chalmers*. Section 301 creates a federal cause of action to enforce "contracts between an employer and a labor organization." It has long been settled that "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957). It is equally well-settled that "the preemptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization"—that "[a]ny such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301." *Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1, 23 (1983), discussing *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962) and *Avco Corp v. Aero Lodge 735*, 390 U.S. 557 (1968).

In *Allis-Chalmers* the Court developed this doctrine further. *Allis-Chalmers* was an action against an employer who had agreed in collective bargaining to make disability payments to injured workers. The plaintiff, an injured employee of the employer, filed a state-law tort action under Wisconsin law, alleging that because of the employer's collectively bargained undertaking, the employer, as a matter of state law, owed a duty of good faith in processing claims for such benefits, and further alleging that the employer had committed a tort by breaching that duty in processing plaintiff's insurance claim. This Court held that such actions, in which the asserted state-law right does not "exist independently of private agreements" but rather represents an attempt by state law "to define the meaning of the contract relationship," are preempted by § 301. 105 S.Ct. at 1912. The Court explained:

> If *the policies that animate § 301 are to be given their proper range . . . the pre-emptive effect of*

> *§ 301 must extend beyond suits alleging contract violations.* These policies require that "the relationships created by [a collective bargaining] agreement" be defined by application of "an evolving federal common law grounded in national labor policy." . . . . The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. *Thus, questions* relating to what the parties to a labor agreement agreed, and *what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort.* Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract.

105 S.Ct. at 1911, (emphasis added).

The court below attempted to distinguish *Allis-Chalmers* as follows:

> In *Allis-Chalmers* the tort was essentially a product of the contract itself—without the contract no tort claim could have existed. Moreover, the collective bargaining contract itself provided the remedy—arbitration—for a breach. Here, plaintiff's claim is essentially one of common law negligence for breach of a duty of care. Neither the collective bargaining agreement nor § 301 provides a remedy.

772 F.2d at 794. But as the Sixth Circuit recognized in *Michigan Mutual*, *Allis-Chalmers* is not distinguishable. Although it is true, as the court below stated, that respondent's claim here "is essentially one of common law negligence" for which "[n]either the collective bargaining agreement nor § 301 provides a [tort] remedy," 772 F.2d at 794, those facts do not differentiate this case from *Allis-Chalmers*. In that case the plaintiff's claim was for breach of a state-created common-law-duty-of-good-faith

that like the common-law of negligence, is simply a variant on the historic court-made law requiring due care under the circumstances. And, of course, in *Allis-Chalmers*, the contract did not provide the plaintiff the remedies he sought, such as exemplary damages.

Nor can *Allis-Chalmers* be distinguished from the instant case, as the Eleventh Circuit thought, on the ground that in *Allis-Chalmers* "without the contract no tort claim could have existed." 772 F.2d at 794. The same is true in the instant case; the alleged source of the defendant's "duty" here is the collective bargaining agreement. Respondent does not claim that Florida law itself obligates the Unions to "assure that the plaintiff was provided safety in her work place" (Complaint ¶ 4, Appendix D); rather respondent is invoking a state-law right which arises from the Union's (alleged) *contractual agreement* to provide safety services—a right that purports to define the legal consequences of assuming that undertaking. And as *Allis-Chalmers*, teaches, "[s]ince the state tort purports to give life to the[] terms [of a collective agreement] in a different environment, it is pre-empted." 105 S.Ct. at 1915.

In sum, the Sixth Circuit was correct in concluding that claims of the type presented here and in *Michigan Mutual* are "preempted by § 301 of the LMRA" and are "definitively foreclosed by the Supreme Court's decision in *Allis-Chalmers*." To resolve the conflict between the Sixth Circuit's decision and the decision below, the Court should grant a writ of certiorari and overturn the Eleventh Circuit's decision.[3]

---

[3] If the Court were to grant a writ of certiorari, petitioners will argue—as an alternative ground supporting reversal—that the Eleventh Circuit was wrong in concluding that the complaint here "does not allege that the union failed to properly represent plaintiff in a claim against the employer," and hence in concluding that the complaint is not preempted by the federal duty of fair representation.

The Eleventh Circuit assumed that determining "the fitness and training of a worker to perform a specified task . . . has traditionally fallen within the realm of the union" and that it was the Union's

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LAURENCE J. COHEN
(Counsel of Record)
ELIHU I. LEIFER
RICHARD M. RESNICK
Suite 801
1125 15th Street, N.W.
Washington, D.C. 20005

ALLAN M. ELSTER
Suite 204
Point East Professional Bldg.
17971 Biscayne Blvd.
North Miami Beach, Florida 33160
Attorneys for Petitioners

Of Counsel:
LAURENCE GOLD
DAVID M. SILBERMAN
815 16th St., N.W.
Washington, D.C. 20006

---

obligation "to assure that [respondent] was first qualified to work in a dangerous electrical substation on the job assigned to her prior to her assignment." But the complaint here alleges that respondent "was assigned by *Florida Power* to work at an electrical substation," and that the Unions acted negligently "by *allowing* [respondent] to be assigned to work in and *allowing* her to actually work in . . . a dangerous location and environment." (Complaint ¶¶ 5, 6; Appendix D; emphasis added.) The only way the Unions could have saved respondent from that assignment by Florida Power was by protesting the assignment to Florida Power. Thus, plaintiff's complaint necessarily asserts a claim over the manner in which the Union represented plaintiff, and the claim is therefore preempted by the duty of fair representation. *See Vaca v. Sipes*, 386 U.S. 171 (1967); *Condon v. Steelworkers Local 2944*, 683 F.2d 590 (1st Cir. 1982).

We do not believe that the Eleventh Circuit's mischaracterization of plaintiff's complaint—and its consequent erroneous conclusion with respect to the preemptive force of the duty of fair representation—presents a question that is independently worthy of this Court's attention. Nonetheless, because that question is fairly subsumed within the question presented herein, and because the Court of Appeals' error in this regard offers an alternative ground for decision, we hereby state our intent to preserve the duty of fair representation issue in the event the Court grants certiorari in this case.

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 84-6213-CIV-JAG

SALLY HECHLER,

Plaintiff,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO and LOCAL 759 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, SYSTEM COUNCIL U-4.

Defendants.

[Filed July 24, 1984]

ORDER OF DISMISSAL

THIS CAUSE has come before the Court upon the defendants' motion to dismiss (docket ## 16, 19), and plaintiff's motion to remand (contained in plaintiff's memorandum in opposition to defendants' motion to dismiss, docket # 24). The Court has considered the motions,* and being otherwise duly advised, it is

ORDERED AND ADJUDGED that the defendants' motion to dismiss be and the same is hereby GRANTED. Plaintiff's motion to remand be and the same is hereby DENIED. Accordingly, this cause is hereby DISMISSED.

---

*Defendant International Brotherhood of Electrical Workers, AFL-CIO's reply to plaintiff's opposition to the union's motion to dismiss, filed on July 16, 1984, is stricken as improperly filed without leave of court to do so.

Plaintiff was an electrical apprentice with Florida Power & Light (FPL), and a member in good standing with the IBEW and its local affiliate. On January 11, 1982, FPL assigned her to a job which plaintiff maintains was beyond the scope of her training. On that day, plaintiff sustained injuries while performing work within the scope of her employment. Plaintiff has sued the IBEW and its local affiliate, alleging that they were negligent in both training and providing her with a safe workplace. In their joint petition for removal (filed Mar. 13, 1984), defendants aver that this court has original jurisdiction under the provisions of section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185. Plaintiff did not object to defendants' removal of this cause to federal district court. The original complaint in this matter was filed in the Circuit Court for the Seventeenth Judicial Circuit of Broward County on February 14, 1984.

In their motion to dismiss, defendants maintain that plaintiffs suit is barred by the six month statute of limitations that governs suits by employees against their union for breach of its duty of fair representation. The plaintiff responds that this action is not based on federal labor law, but on state common law. As such, plaintiff argues that this court should remand the case back to the circuit court. The legal issue presented by the parties' positions is whether plaintiff's suit is one based on federal or state law? If the court finds the case premised on state law, then the court may remand the matter because section 1447(c) allows for remand if a case was removed improvidently and without jurisdiction. In contrast, the case will be dismissed if plaintiff's action is brought under federal law.

The gravamen of plaintiff's complaint is that the unions breached an alleged duty owed to the plaintiff to assure that she was

> provided safety in her work place and a safe work place, and further, the plaintiff would not be required or allowed to take undue risks in the performance of her duties which were not commensurate with her training and experience or to work in an area which was not safe as commensurate with here training or experience.

Complaint ¶ 4. Significantly, the duty allegedly owed to plaintiff flows from the collective bargaining agreement, which imposes a duty on the unions to monitor the safety and training of its members. *See* Memorandum of Agreement between FPL and IBEW 1982-1983, 59-61, 129-131 (appendix A).

A union's failure to monitor the employee's workplace may constitute a breach of its duty of fair representation. For example, in *Mahoney v. Chicago Pneumatic Tool*, 11 LRRM 2839 (W.D. Mich. 1982), the employee charged the union with failing to "train and test plaintiff properly and adequately, particularly in matters of safety, before certifying him as a journeyman boilermaker; failure to instruct the plaintiff regarding state regulations applicable to the use of grinding equipment; the failure to insure that the Union supervisors were properly trained; and finally, the failure to ascertain whether the contractors offered adequate training, equipment, and supervision." *Id.* at 2840. The district court found that "the Union's involvement with the setting up of an apprenticeship program with the employer and its efforts in the area of workplace safety are 'inextricably intertwined and embodied in the union's duty of fair representation.'" *Id. See also Burgess v. Allendale Mutual Insurance Co.*, 111 LRRM 2997 (S.D. Ga. 1982). Issues involving a union's duty of fair representation are governed by federal law. *Vaca v. Sipes*, 386 U.S. 171 1967).

Plaintiff challenges this conclusion. She contends that the activities in question are wholly unrelated to the

collective bargaining agreement in force at the time of her accident. *Mobley v. Southern Plasma Corporation*, 366 So. 2d 480 (Fla. 1st DCA 1979), is cited in support of her position. In *Mobley*, the employee charged that her employer had fired her because of her union activities. The court was required to decide whether the employee's accusations constituted a federal issue within the ambit of the National Labor Relations Board (NLRB), or whether the allegations were sufficient to state a claim for an action akin to intentional infliction of emotional distress based on state law. The *Mobley* court explained that under *Farmer, Special Administrator v. United Brotherhood of Carpenters & Joiners of America, Local 25*, 430 U.S. 290, 305-06 (1977), "state labor remedies are preempted by the NLRA unless the offending conduct was something more than discrimination in employment practices, i.e., 'that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.' " 366 So. 2d at 482.

Although *Mobley* involved a suit between the employee and the *employer*, and thus is facially unrelated to the instant case, the decision does give one a sense of what is necessary for the state issue to preempt the federal labor issue. As applied herein, the plaintiff would have to demonstrate that the unions' allegedly negligent activity was unrelated to the collective bargaining agreement or beyond the scope of the employee-union fiduciary relationship. Plaintiff has not satisfied this pleading requirement.

Because federal labor law controls here, the court must look to the federal statute of limitations. Section 10(b) of the Labor-Management Relations Act sets forth a six month statute of limitation for suits based on a union's breach of its duty of fair representation. The Supreme Court, in *DelCostello v. Teamsters*, 103 S. Ct. 2281

(1983), linked the six month period to the breach of duty charge. Plaintiff filed her suit in state court over two years after she sustained her injury. Under the clear authority of *DelCostello*, and the Eleventh Circuit's clarification of that decision in *Erkins v. United Steelworkers of America*, 723 F.2d 837, 838 (11th Cir. 1984), this case is dismissed because plaintiff failed to file suit within the prescribed time frame.

DONE AND ORDERED in chambers at Fort Lauderdale, Florida, this 24th day of July, 1984.

/s/ Jose A. Gonzalez, Jr.
United States District Judge

cc: counsel of record
encl. Appendix A

APPENDIX A

MEMORANDUM OF AGREEMENT

between

FPL

FLORIDA POWER & LIGHT COMPANY

and

[SEAL]

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

1982-1983

MEMORANDUM OF AGREEMENT

AGREEMENT, made and entered into this 28 day of August, 1953, as amended and changed May 20, 1951, as amended and changed September 28, 1955, as amended and changed November 2, 1956, as amended and changed December 30, 1957, as amended and changed February 11, 1959, as amended and changed December 21, 1960, as amended and changed April 10, 1963, as amended and changed March 16, 1965, as amended and changed February 17, 1967, as amended and changed August 18, 1969, as amended and changed January 14, 1970, as amended and changed March 18, 1970, as amended and changed February 3, 1972, as amended and changed November 15, 1972, as amended and changed February 1, 1974, as amended and changed December 6, 1975, as amended and changed March 10, 1978, and as amended and changed February 15, 1980, and as amended and changed March 26, 1982, between the FLORIDA POWER & LIGHT COMPANY, its successors or assigns, (hereinafter called the "Company") and THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO through its System Council U-4 comprising.

LOCAL UNIONS

No. 359—Miami
No. 622—Lake City
No. 627—Fort Pierce
No. 641—Punta Gorda
No. 759—Fort Lauderdale
No. 820—Sarasota and Bradenton
No. 1042—Sanford
No. 1066—Daytona Beach
No. 1191—West Palm Beach
No. 1263—Palatka and St. Augustine
No. 1908—Cocoa

(hereinafter called the "Union"), as the exclusive bargaining representative for employees of the Company in the payroll classifications listed in Exhibit "A" attached hereto, now or hereinafter employed by the Company during the terms of this Agreement.

WITNESSETH:

That the parties hereto agree as follows:

* * * *

45. SAFETY

(a) The safety of the employees is a matter of paramount importance, shall receive first consideration, and no employee shall be allowed or required to take any undue risk in the performance of his duties which he or his Foreman or Supervisor consider unsafe to himself or to his fellow workers. Supervisors and Foreman will be held strictly responsible for the enforcemant of safe working rules. In case any Supervisor or Foreman is charged by an employee, or any employee is charged by the Company as being at fault in connection with any accident and such charge is deemed unfair, this action may be taken up as a grievance as provided in Article IV.

(b) The Company and the Union agree to establish a Joint Safety Committee of six (6) members, which shall be the same personnel that composes the Joint Apprenticeship Committee, plus one (1) additional Committeeman to be selected by the Union from the other Department than that from which the President of the System Council comes, and one (1) additional Committeeman selected by the Company. The Joint Safety Committee shall be responsible for developing and recommending an effective safety program for all employees covered by this Agreement, including changes or additions to present safety rules, conducting investigations of accidents when deemed necessary. It is neither the intention of the Company nor

the Union to use this program for the purpose of creating work rules governing hours of work and conditions of employment.

This Committee will not involve itself in disciplinary action.

It is agreed that the Local Joint Advisory Safety Committees will continue to function in an advisory capacity to the Joint Safety Committee, as outlined in the "Standards and Procedures for the Administration of the Joint Advisory Safety Program".

It is further agreed that in those cases involving materials, safety tools, devices and equipment, it will be the function of the Joint Safety Committee to recommend changes, deletions and additions, as prescribed by the "Standards and Procedures of the Joint Safety Program".

Either party has the privilege of terminating this program on thirty (30) days' notice.

* * * *

MISCELLANEOUS

The Manner an Electrical Apprentice Will Work

It is recognized that an Electrical Apprentice is in training under Journeymen to become a qualified Journeyman. It is also recognized that as he progresses in his apprenticeship, he becomes qualified to perform productive work, and will be expected to perform all the duties of a Journeyman which he has beecome qualified to do. It is not the intention of the Company to use an Apprentice on any type of work which the Apprentice has not become qualified to perform through experience and training. In this regard, the Company will not require an Apprentice to work on, climb through or work above energized conductors carrying more than 500 volts during his first year of apprenticeship.

After completing his first year, the determination of whether the Apprentice is qualified to work on conductors

carrying more than 500 volts will be made by the Apprentice himself, the Foreman supervising the Apprentice, and the Journeyman with whom he works. Should any question arise as to whether or not he is qualified to perform the duties assigned to him, which cannot be resolved locally it shall be brought to the attention of the Supervisor of Apprentice Training, who will investigate the qualifications of the Apprentice and report his findings to the Joint Apprenticeship Committee for determination as to whether the Apprentice is qualified to perform the work in question.

For the Union	For the Company
/s/ A. A. Moore	/s/ Robert W. Wall, Jr.

5-18-60

MISCELLANEOUS

The Manner an Electrical Apprentice Will Work

It has come to the attention of the Apprentice Committee that the "Memorandum of Understanding as to the Manner an Electrical Apprentice Will Work" is being interpreted in some locations that after an Apprentice has the required first year of apprenticeship, he can be required to work on conductors carrying more than 500 volts. The Memorandum clearly provides that the determination of whether an Apprentice is qualified to work on conductors carrying more than 500 volts will be made by the Apprentice himself, the Foreman supervising the Apprentice, and the Journeyman with whom he works. Even if the Apprentice has more than the first year as an Apprentice, the above determination must be made. In arriving at the first year of apprenticeship, the time in classification plus credit allowed for related experience is to be used.

For the Union	For the Company
/s/ A. A. Moore	/s/ Robert W. Wall, Jr.

11-12-57

* * * *

APPENDIX B

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 84-5799

SALLY HECHLER,
Plaintiff-Appellant,
v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, an unincorporated association, LOCAL 759 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO SYSTEM COUNCIL U-4, an unincorporated association,
Defendants-Appellees.

Sept. 30, 1985

Rehearing and Rehearing En Banc
Denied Nov. 14, 1985

Appeal from the United States District Court the
the Southern District of Florida

Before HENDERSON and CLARK, Circuit Judges, and TUTTLE, Senior Circuit Judge.

CLARK, Circuit Judge:

This case raises important questions concerning an individual union member's right to sue a union for its alleged negligent acts and whether such a suit can be maintained in state court without violating the doctrine of federal preemption as concerns the National Labor Rela-

tions Act (NLRA) and the Labor Management Relations Act (LMRA). Plaintiff was an electrical apprentice with Florida Power & Light (FPL), and a member in good standing with the International Brotherhood of Electrical Workers (IBEW) and its local affiliate. On January 11, 1982, FPL assigned her to a job which she alleges was beyond the scope of her training. On that day, plaintiff sustained injuries while performing work within the scope of her employment. Plaintiff sued the IBEW and its local affiliate, alleging they were negligent in both training and providing her with a safe work place. The gravamen of plaintiff's complaint is that the unions breached a duty owed to her to assure that she was "provided safety in her work place and a safe work place, and further, the plaintiff would not be required or allowed to take undue risks in the performance of her duties which were not commensurate with her training and experience or to work in an area which was not safe as commensurate with her training and experience." In sum, plaintiff alleged that the union had a duty to ascertain that she had had the essential training, background, education, and experience before being assigned to work in an inherently dangerous work place such as an electrical substation, and that the union breached that duty.[1]

---

[1] The agreement between FPL and the IBEW provided in pertinent part:

> 45. Safety
>
> (a) The safety of the employees is a matter of paramount importance, shall receive first consideration, and no employee shall be allowed or required to take any undue risk in the performance of his duties which he or his Foreman or Supervisor consider unsafe to himself or his fellow workers. Supervisors and Foremen will be held strictly responsible for the enforcement of safe working rules.
>
> MISCELLANEOUS
>
> The Manner an Electrical Apprentice Will Work
>
> It is recognized that an Electrical Apprentice is in training under Journeymen to become a qualified Journeyman. It is also

The district court found that the duty allegedly owed to the plaintiff flowed from the collective bargaining agreement which imposed a duty on the union to monitor the safety and training of its members. The district court

---

recognized that as he progresses in his apprenticeship, he becomes qualified to perform productive work, and will be expected to perform all the duties of a Journeyman which he has become qualified to do. It is not the intention of the Company to use an Apprentice on any type of work which the Apprentice has not become qualified to perform through experience and training. In this regard, the Company will not require an Apprentice to work on, climb through or work above energized conductors carrying more than 500 volts during his first year of apprenticeship.

After completing his first year, the determination of whether the Apprentice is qualified to work on conductors carrying more than 500 volts will be made by the Apprentice himself, the Foreman supervising the Apprentice, and the Journeyman with whom he works. Should any question arise as to whether or not he is qualified to perform the duties assigned to him, which cannot be resolved locally it shall be brought to the attention of the Supervisor of Apprentice Training who will investigate the qualifications of the Apprentice and report his findings to the Joint Apprenticeship Committee for determination as to whether the Apprentice is qualified to perform the work in question.

* * * *

MISCELLANEOUS

The Manner an Electrical Apprentice Will Work

It has come to the attention of the Apprentice Committee that the "Memorandum of Understanding as to the Manner an Electrical Apprentice Will Work" is being interpreted in some locations that after an Apprentice has the required first year of apprenticeship, he can be required to work on conductors carrying more than 500 volts. The Memorandum clearly provides that the determination of whether an Apprentice is qualified to work on conductors carrying more than 500 volts will be made by the Apprentice himself, the Foreman supervising the Apprentice, and the Journeyman with whom he works. Even if the Apprentice has more than the first year as an Apprentice, the above determination must be made. In arriving at the first year of apprenticeship, the time in classification plus credit allowed for related experience is to be used.

held that the union's failure to monitor the employee's work place constituted a breach of its duty of fair representation. The court further held that the plaintiff had failed to demonstrate that the union's allegedly negligent activity was unrelated to the collective bargaining agreement or beyond the scope of the employee/union fiduciary relationship. Consequently, the district court ruled that plaintiff's suit was based on federal labor law and that the suit had been properly removed from state to federal court. Finding that federal law applied, the district court then looked to § 10(b) of the Labor Management Relations Act, 29 U.S.C. § 160(b), which sets a six-month statute of limitation for suits alleging an unfair labor practice. The court noted that the Supreme Court in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983) had applied the six-month limitations period of § 10(b) to a hybrid § 301/fair representation suit brought by an employee against his employer and union. Plaintiff here filed her suit in state court over two years after she sustained her injury. The district court found that the rationale of *DelCostello* applied to plaintiff's case because her suit was based upon the union's breach of its duty of fair representation. Accordingly, the district court dismised the suit for failure to comply with the federal statute of limitations.

We reverse and remand for the district court to remand the case to the state court, finding that plaintiff's complaint on its face states a common law negligence claim that may be cognizable in state court and is not preempted by the federal labor laws.

General Principles Involving Federal Preemption Under The NLRA And LMRA

In conferring broad powers upon the National Labor Relations Board (NLRB) to interpret and enforce the NLRA, Congress did not specify the extent to which existing state regulation was preempted. Thus, the breadth of

preemption mandated by the NLRA was left to interpretation by the courts.

In *Garner v. Teamsters Union*, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228 (1953), the Court held that a state court was not empowered to enjoin union picketing instituted in an attempt to organize a company's employees, where there was no observable threat to public safety. The question presented to the Court was whether "the State, through its courts, may adjudge the same controversy and extend its own form of relief" when resolution of such controversy falls within the jurisdiction of the NLRB. *Garner*, 346 U.S. at 489, 74 S.Ct. at 165. The Court found the state's action preempted: "Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies," because a "multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garner*, 346 U.S. at 490-91, 74 S.Ct. at 166.

The next year in *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 74 S.Ct. 833, 98 L.Ed. 1025 (1954), the Court allowed a state tort action brought by a company against a union on the basis of asserted threats of violence accompanying the union's demand that the company recognize the union as the sole bargaining agent for its employees. Although recognizing that the conduct sued upon also violated § 8 of the Act, creating an administrative remedy before the board, the Court found *Garner* distinguishable because in that case the state's injunctive procedures conflicted with the administrative remedy available before the board, while in *Laburnum* Congress had provided no administrative substitute for the remedy available under state law.

> Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct. We see no substantial reason for reaching such a result.
>
> * * * *
>
> To the extent that Congress prescribed preventive procedure against unfair labor practices, [*Garner*] recognized that the Act excluded conflicting state procedure to the same end. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. The care we took in the Garner case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived. The primarily private nature of claims for damages under state law also distinguishes them in a measure from the public nature of the regulation of future labor relations under federal law.

Laburnum, 347 U.S. at 663-64, 74 S.Ct. 837-38.

Significantly, in permitting the state court suit, the Court made the following observation on the purposes behind the Labor Management Relations Act (LMRA):

> The 1947 Act has increased, rather than decreased, the legal responsibilities of labor organizations. . . . The fact that it prescribed new preventive procedure against unfair labor practices on the part of labor organizations was an additional recognition of con-

> gressional disapproval of such practices. Such an express recognition is consistent with an increased insistence upon the liability of such organizations for tortious conduct and inconsistent with their immunization from liability for damages caused by their tortious practices.

Laburnum, 347 U.S. at 666-67, 74 S.Ct. at 839 (footnote omitted).

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), the Court reiterated the preemption doctrine but outlined two general exceptions to preemption. In *Garmon* the employer had refused the union's request to enforce a closed-shop, leading the union to begin picketing his place of business. The employer brought suit in California Superior Court and was granted an injunction plus $1,000 in damages. The Supreme Court reversed, finding that state court jurisdiction is preempted "[w]hen it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by § 7 of the [NLRA], or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield." *Garmon*, 359 U.S. at 244, 79 S.Ct. at 779. However, the Court in *Garmon* also announced two limited exceptions to the preemption doctrine, "where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . [o]r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act." *Garmon*, 359 U.S. at 243-44, 79 S.Ct. at 779 (citation and footnote omitted).

More recently in *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977) the Court allowed an employee's state action

against his union for intentional infliction of emotional distress, in the form of personal abuse and harassment because of dissident political activity. Acknowledging the central question posed in *Garmon*, whether the activities are protected by § 7 or prohibited by § 8, the Court noted its previous refusal to apply the preemption doctrine to activities otherwise within the scope of the LMRA if such activities were merely of peripheral concern to the Act, or involved interests so deeply rooted in local concern that in the absence of compelling congressional direction it would be improper to infer that Congress had deprived the states of their power to act. *See Farmer*, 430 U.S. at 296-97, 97 S.Ct. at 1061. Thus, a review of relevant Supreme Court precedent establishes three factors that must be present before state courts may assert jurisdiction and avoid federal preemption; (1) the state action must be of peripheral concern to federal labor law; (2) the state action must involve conduct in which a state has an overriding interest and which is deeply rooted in local concern; and (3) there must be little risk that the state cause of action will interfere with the effective administration of federal labor policy.

In analyzing whether federal preemption applies to the case *sub judice*, we must determine whether plaintiff's complaint essentially alleges either an unfair labor practice or duty of fair representation claim, or a breach of contract claim under § 301.

Federal Preemption under § 301

Turning first to the availability of a breach of contract claim under § 301,[2] plaintiff admits that such a remedy

---

[2] Section 301(a) reads:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect

may have been available to her but asserts that her complaint sounded in tort not contract, and that a § 301 suit would not provide the full measure of compensatory damages available under state law. We find ourselves in agreement with plaintiff, for nothing in § 301, with the possible exception of back wages, provides the plaintiff with the full measure of damages available in tort. Nor does the fact that a state action may in part involve the same relief available under § 301 mandate preemption. As stated by the Supreme Court in *International Union, United Automobile Workers v. Russell*, 356 U.S. 634, 78 S.Ct. 932, 21 L Ed.2d 1030 (1958):

> In this case there is a possibility that both the Board and the state courts have jurisdiction to award lost pay. However, that possibility does not create the kind of "conflict" of remedies referred to in Laburnum. Our cases which hold that state jurisdic-

---

to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. 185.

While the great majority of cases brought under § 301 are suits by unions against employers to enforce the terms of a collective bargaining agreement, it is now undisputed that an individual employee may bring suit under § 301:

> The concept that all suits to vindicate individual employee rights arising from a collective bargaining contract should be excluded from the coverage of § 301 has thus not survived. The rights of individual employees concerning rates of pay and conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts. Individual claims lie at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based.

Smith v. Evening News Association, 371 U.S. 195, 200, 83 S.Ct. 267, 270, 9 L.Ed.2d 246 (1962). Moreover, an individual employee may sue the union for a breach of its contractual obligation. *See Farmer, supra*, 430 U.S. at 303 n. 12, 97 S.Ct. at 1065 n. 12.

> tion is pre-empted are distinguishable. In them we have been concerned lest one forum would enjoin, as illegal, conduct which the other forum would find legal, or that the state courts would restrict the exercise of rights guaranteed by the Federal Acts.
>
> In the instant case, there would be no "conflict" even if one forum awarded back pay and the other did not. There is nothing inconsistent in holding that an employee may recover lost wages as damages in a tort action under the state law, and also holding that the award of such damages is not necessary to effectuate the purpose of the Federal Act.

Id. at 644-45, 78 S.Ct. at 938-39 (footnote omitted).

Nor would plaintiff's state action run afoul of the Supreme Court's recent pronouncement in *Allis-Chalmers Corp. v. Lueck*, —— U.S. ——, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985), where the Court stated: "[W]hen resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, *see Avco Corp. v. Aero Lodge 735*, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968), or dismissed as preempted by federal labor-contract law." *Id.*, 105 S.Ct. at 1916. The respondent in *Allis-Chalmers* had brought a state action for the bad-faith handling of an insurance claim arising out of a disability insurance plan included in a collective bargaining agreement. Though respondent's claim constituted a tort under Wisconsin law, the collective bargaining agreement had established a disability grievance procedure that culminated in final and binding arbitration. When the dispute arose over the insurer's handling of respondent's disability claim, he brought a tort suit against petitioner in state court rather than utilizing the grievance procedure.

The Court found that respondent's tort suit was pre-empted because "[u]nder Wisconsin law, the tort in-

trinsically relates to the nature and existence of the contract. *Hilker v. Western Automobile Ins. Co.*, 204 Wis. 1, 13-16, 235 N.W. 413, 414-15 (1931). Thus, the tort exists for breach of a 'duty devolve[d] upon the insurer by reasonable implication from the express terms of the contract,' the scope of which, crucially, is 'ascertained from a consideration of the contract itself.' *Id.* at 16, 235 N.W. at 415." *Allis-Chalmers*, 105 S.Ct. at 1914. Thus, the Court concluded that: "Because the right asserted not only derives from the contract, but is defined by the contractual obligation of good faith, any attempt to assess liability here inevitably will involve contract interpretation. . . . Congress has mandated that federal law govern the meaning given contract terms. Since the state tort purports to give life to these terms in a different environment, it is pre-empted." *Id.* at 1915.

The difference between *Allis-Chalmers* and the instant case is easily seen. In *Allis-Chalmers*, the tort was essentially a product of the contract itself—without the contract no tort claim could have existed. Moreover, the collective bargaining contract itself provided the remedy —arbitration—for a breach. Here, plaintiff's claim is essentially one of common law negligence for breach of a duty of care. Neither the collective bargaining agreement nor § 301 provides a remedy. Though the contract may be of use in defining the scope of the duty owed, liability will turn on basic negligence principles as developed by state law. Moreover, the Court in *Allis-Chalmers* emphasized that its holding was not meant to have preclusive effect on all tort suits arising out of a labor agreement.

> It is perhaps worth emphasizing the narrow focus of the conclusion we reach today. We pass no judgment on whether this suit also would have been preempted by other federal laws governing employment or benefit plans. Nor do we hold that every state-law suit asserting a right that relates in some way

> to a provision in a collective-bargaining agreement, or more generally to the parties to such an agreement, necessarily is pre-empted by § 301. The full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis.

Allis-Chalmers, 105 S.Ct. at 1916.

Federal Preemption and the Duty of Fair Representation

In determining whether plaintiff's suit is preempted because it asserts no more than an unfair labor practice claim or a duty of fair representation claim, we first turn to *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967) where the Supreme Court stated that a union breaches its duty of fair representation when it treats an individual in an arbitrary, discriminatory, or bad faith manner. *Id.* at 190, 87 S.Ct. at 916. In establishing the requisite bad faith conduct more than mere negligence must be shown. *See Vaca, supra*, 386 U.S. at 194-95, 87 S.Ct. at 919; *Harris v. Schwerman Trucking Co.*, 688 F.2d 1204, 1206 (11th Cir.1982).

Several cases provide guidance on the question of whether a suit for negligence against a union can be no more than a duty of a fair representation claim and therefore is preempted by federal law. In *Bryant v. UMW*, 467 F.2d 1 (6th Cir.1972) *cert. denied*, 410 U.S. 930, 93 S.Ct. 1370, 35 L.Ed.2d 592 (1973), the plaintiff brought suit against the union for its negligent failure to enforce a mine safety provision in the collective bargaining agreement. The provision at issue in the collective bargaining agreement called for the creation of a mine safety committee to be selected by the local union. The provision provided that the mine safety committee "may inspect" the mine and report its findings and recommendations to the management. *Bryant*, 467 F.2d at 4 n. 3. However, the union acted only in an advisory capacity and the enforcement of the mine's safety regulations was left to

a grievance and arbitration process. Thus, the Sixth Circuit held that the union in this instance had not undertaken any duty beyond its usual duty of fair representation. *Bryant*, 467 F.2d at 5. The principal basis for the court's decision was that the union under the contract had not undertaken any affirmative duty to inspect the mines for its members benefit. In the case *sub judice*, the plaintiff alleges that the union had a specific duty to determine her fitness to confront and work with the dangers inherent in the job to which she was assigned.

In *Helton v. Hake*, 386 F.Supp. 1027 (W.D.Mo.1974), the survivors of a deceased employee brought a state action against the union asserting negligence by the union in its violation of a duty imposed by the collective bargaining agreement to assure that no iron work was performed near high-tension power lines. Finding in the plaintiffs' complaint no allegation of a breach by the union of its duty of fair representation, and in the absence of any charge of arbitrary or discriminatory conduct, the court allowed the state action as the only available means of redress for the plaintiffs. *Id.* at 1030-31. Moreover, the court found that the contract had imposed upon the union an affirmative duty to enforce safety rules:

> In the instant case, taking the allegations contained in the complaint as true, the contract did impose upon the defendant union an affirmative duty to enforce safety rules. The compaint alleges that the union, through its agent, the steward, negligently and carelessly failed to enforce the safety rules relating to work in the area of high tension power lines. The suit is clearly brought as an action in tort seeking recovery for wrongful death due to the alleged negligence of the defendants. The only relevance of the collective bargaining agreement appears to be that it would determine, to some extent at least, the nature and scope of defendants' duty. The defend-

> ants' duty may have arisen under a contract does not in and of itself change the basic nature of this action, which is a suit in tort to recover damages for injuries sustained due to defendants' alleged negligence.

Id. at 1031. The court went on to find that the complaint could not properly be construed as a suit for violation of a collective bargaining agreement under § 301:

> Merely because some interpretation of the contract appears to be necessary to the determination of the nature, scope or extent of the duty owed does not, in and of itself, categorize this cause as an action for violation of the contract so as to grant jurisdiction to this Court under Section 301(a). . . . [T]his Court cannot conclude that this negligence action to recover damages for wrongful death falls within Section 301's ambit. Plaintiffs herein are not praying for reinstatement or back wages, or for an improvement in working conditions.

Id. at 1033-34 (citations omitted).

Another case which utilized a similar analysis is *Dunbar v. United Steelworkers of America*, 100 Idaho 523, 602 P.2d 21 (1979), *cert. denied*, 446 U.S. 983, 100 S.Ct. 2963, 64 L.Ed.2d 839 (1980), where the court upheld a wrongful death action against the union for negligence in breaching its contractual obligations regarding mine safety. The court distinguished the Sixth Circuit's *Bryant* decision on the ground that no contractual duty was found in that case whereas in *Dunbar*, the collective bargaining agreement mandated that the union "shall inspect" the mine. *Dunbar*, 602 P.2d at 26.

However, in a suit arising out of the same accident as in *Dunbar*, *House v. Mine Safety Applicance Co.*, 417 F.Supp. 939 (D.Idaho 1976), the district court refused to allow a negligence action finding that the asserted grounds of liability depended entirely upon the contract,

that the safety of working conditions was a cornerstone of union movement, and thus the suit was for a breach of the collective bargaining agreement and preempted by § 301. *Id.* at 944. The court in *House* went on to state, "[i]n light of the collecting bargaining agreement in this case, a theory of common law negligence for breach of an alleged safety duty is inextricably intertwined and embodied in the union's duty of fair representation." *Id.* at 945 (footnote omitted). Finally, the court found that policy considerations dictated federal preemption of common law negligence suits against unions because of the following two factors: (1) punishing unions for failure to assure compliance by the company with safety provisions called for in the collective bargaining agreement would undermine the incentive of employers to comply with such agreement; and (2) imposing such liability would discourage unions from including such safety standards in collective bargaining agreements. *Id.* at 946.

These policy considerations were subsequently embraced by the First Circuit in *Condon v. Local 2944, United Steelworkers of America*, 683 F.2d 590 (1st Cir.1982) where the court refused to allow a negligence suit against a union for its alleged failure to properly perform its safety monitoring function. The court concluded that "a union cannot be held liable for the negligent performance of a duty it assumed that arose inextricably, as here, from the safety and health provisions of a collective bargaining agreement." *Condon*, 683 F.2d at 595.[3]

---

[3] We note that *Bryant* and *Condon* are distinguishable from the instant case because both involved the determination of fitness of the work place. This area has traditionally been a company function, and as *Bryant* and *Condon* demonstrate, recent union involvement has primarily been in an advisory capacity.

However, in the case *sub judice* the fitness and training of a worker to perform a specified task is at issue, a determination that has traditionally fallen within the realm of the union as demonstrated by the journeymen system. Indeed, the union in establishing a hierarchy of skilled positions, utilizes its expertise in determining the

The conflicting case law outlined above indicates that there are two key issues which must be addressed in determining whether a common law negligence suit is available against a union. First, a court must determine whether the duty allegedly breached by the union is so inextricably intertwined with the collective bargaining agreement that only a duty of fair representation claim is available, thereby preempting any claim for a common law tort. Second, in making this determination, a court must be aware of federal labor policy and whether a negligence suit against a union impermissibly impedes upon the federal labor-management regulatory scheme.

With regard to the latter concern, the primary inquiry is whether the duty sought to be enforced against the union in the negligence suit is so tangential and remote to the federal scheme that the suit is properly exempted from the preemption rule. *See Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed. 2d 338 (1977). Our balancing of the relevant factors leads us to conclude that plaintiff's negligence claim is not preempted.

First, we note that the duty of fair representation is designed "to enforce fully the important principle that no individual union member may suffer invidious, hostile treatment at the hands of the majority of his co-workers." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 301, 91 S.Ct. 1909, 1925, 29 L.Ed.2d 473 (1971). We are

---

relative qualifications of its individual members. Petitioner alleges that under the collective bargaining agreement, the union had a contractual obligation to properly train her and that her injuries on the job resulted from the union's tortious breach of this obligation. Unlike the mine safety cases discussed *supra*, there is no allegation here that the union and company shared joint responsibility for worker training. However, the collective bargaining agreement between FPL and the IBEW is not entirely clear on who bears ultimate responsibility for worker training and safety. However, this does not relate to the preemption issue, which is the only issue decided by this opinion.

aware of no authority which indicates that a duty of fair representation displaces those duties created by state law which prohibit a person or corporation from engaging in tortious conduct resulting in death or injury to a person or property. For instance, nothing in the federal scheme, either directly or by implication, protects a union's negligence in the training or assignment of one of its members anymore than it protects libel, violent tortious activity, or intentional infliction of emotional distress.[4] Moreover, nothing in the statutory scheme expressly addresses such conduct, or provides a mechanism for its redress. Likewise, it cannot be said that by failing expressly to protect or prohibit acts of negligence by unions, Congress intended to permit unions to engage in negligent acts free of the scrutiny of state courts. Rather, it is far more likely that Congress "by silence indicate[d] a purpose to let state regulation be imposed. . . ." *Retail Clerks International Association v. Schermerhorn*, 375 U.S. 96, 104, 84 S.Ct. 219, 223 11 L.Ed.2d 179 (1963) (citing *Florida Avocado Growers v. Paul*, 373 U.S. 132, 141-43, 83 S.Ct. 1210, 1216-18, 10 L.Ed.2d 248 (1963)).

Nor is the union's contractual duty to assure worker training as a prerequisite to the assignment of the worker to an area of danger inextricably intertwined with its federal duty of providing fair representation to its members. The district court below found that Hechler had failed to "demonstrate that the union's allegedly negligent activity was unrelated to the collective bargaining agreement or beyond the scope of the employee/union fiduciary relationship." *Record Excerpt* at 14. This requirement is far too onerous, for all of the cases on this subject involve con-

---

[4] *See Sears, Roebuck and Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 196 n. 25, 98 S.Ct. 1745, 1757 n. 25, 56 L.Ed.2d 209 (1978); *Farmer v. United Brotherhood of Carpenters, supra*, 430 U.S. at 299, 97 S.Ct. at 1063; *Linn v. United Plant Guard Workers*, 383 U.S. 53, 61-62, 86 S.Ct. 657, 662-63, 15 L.Ed.2d 582 (1966); *United Construction Workers v. Laburnum Construction Corp., supra*, 347 U.S. at 664-65, 74 S.Ct. at 837-38.

duct which is related to the collective bargaining agreement. Otherwise, there would be no preemption issue at all. Further, this claim does not grow out of "the employee/union fiduciary relationship." The question is whether the challenged activities are beyond the central scope of the federal regulatory scheme, not beyond the scope of the employee/union relationship. That question is satisfied in this case because the conduct at issue is not prohibited nor protected by the federal scheme. As previously discussed, the plaintiff has no duty of fair representation action against the union since this complaint does not allege that the union failed to properly represent plaintiff in a claim against the employer. Moreover, the fact that some deference to a collective bargaining agreement must be made in order to define the scope of the union's duty does not automatically lead to the conclusion that a suit in negligence must be interpreted as no more than a § 301 action and therefore is preempted. As noted by the district court in *Helton v. Hake*, 386 F.Supp. 1027, 1033 (W.D.Mo.1974), to adopt such a view,

> would lead to the inescapable conclusion that any case in which interpretation of a collective bargaining agreement may be involved vest jurisdiction in the federal district courts under Section 301(a), regardless of the actionable wrong complained of or the relief sought, or how directly or indirectly related the collective bargaining agreement is to the action.

Id. at 1033.

The next question is whether a state court's adjudication of the claim would threaten interference with the federal scheme. As previously noted even if the state action threatens adjudication of matters cognizable by the board or by a court adjudicating federal labor law, the state action may be permissible if only peripherally related to the federal scheme or is deeply rooted in the state's concerns. *See Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, supra*, 436 U.S.

at 188 n. 13, 98 S.Ct. at 1753 n. 13; *Farmer v. United Brotherhood of Carpenters, supra*, 430 U.S. at 296-97, 97 S.Ct. at 1061-62. Thus, even if state action threatens some potential interference with the regulatory scheme, this court must balance the extent of that threat against the importance of the action to the state. We find no impermisible conflict with the federal regulatory scheme in this case because there is no realistic threat that the state court will adjudicate any significant matters cognizable either by the board or by a federal or state court adjudicating a federal cause of action arising under the labor laws. We emphasize at this point the narrow scope of our holding. We decide this case on the facts presented. This case is distinguishable from the cases previously described [5] in which the plaintiff sought relief from the union for a breach of its general duty to inspect for safety for the benefit of the entire work force in the workplace pursuant to the collective bargaining agreement. We will wait until a later date to decide the issue presented to the courts in *Bryant*, *Dunbar*, and *Condon*. In the present case the plaintiff alleges a duty running from the union to her individually that required the union to assure that she was first qualified to work in a dangerous electrical substation on the job assigned to her prior to her assignment. The plaintiff does not claim the union was responsible for making the substation safe for all of the workers.

The State of Florida has a strong interest in redressing negligent conduct, not only for the personal benefit of the plaintiff but also for the public safety as well. It can be argued that the Supreme Court's opinions have focused primarily upon state law claims of outrageous conduct and that the claim in this case is less important than the interest in public safety and order which the court has invoked in permitting state actions to prevent or redress potentially violent conduct. *See San Diego Building Trades*

---

[5] See pages 794-96, *supra*, and discussion of *Bryant, Helton, Dunbar, House*, and *Condon*.

Council v. Garmon, supra, 359 U.S. at 247-48, 79 S.Ct. at 780-81 (citing *United Construction Workers v. Laburnum Construction Corp., supra*). However, the same lesser status could be assigned to the state's interest in redressing defamation or the intentional infliction of emotional distress, two causes of action which concern primarily personal as opposed to public injury; which the court has also permitted. *See Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, supra*, 436 U.S. at 196 n.25, 98 S.Ct. at 1757 n. 25 (citing *Farmer v. United Brotherhood of Carpenters, supra*). Additionally, the Supreme Court in *Farmer* spoke generally about the state's interest in protecting its citizens and in referring to defamation cases like *Linn v. United Plant Guard Workers, supra*, has ascribed to the states an interest in preventing defamtion no less strong than its interest in protection from physical injury. *Farmer, supra*, 430 U.S. at 302, 97 S.Ct. at 1064-65.

The next aspect of our analysis turns to the concern that holding a union liable for its negligent acts would disrupt labor relations policy and would discourage unions from undertaking affirmative safety responsibilities in collective bargaining agreements. As stated by the court in *House*:

> To permit a sanction of legal liability to accompany a union's exercise of responsibility in safety matters, together with either loss shifting or sharing, would weaken the duty of the employer at the expense of the union and its members. Union funds are derived from its members and only the largest unions may be potentially able to absorb the type of loss involved in this case. While unions may seek insurance coverage, the cost must be borne by the membership. Unions do not have finite limits of liability as do employers under workmen's compensation, nor can unions pass along such a loss to the public as may an employer. Moreover, the result is readily apparent, if unions could be held liable in cases such as this—there would be no negotiation on safety matters. To

> impose liability on the union in a case such as this is against public policy and would seriously disrupt labor relations policy.

House, 417 F.Supp. at 946-47 (footnotes omitted). Likewise, the Sixth Circuit in *Bryant v. Mine Workers*, *supra*, stated:

> This Court is not unfamiliar with the difficult and longstanding problem of ensuring safety in the coal mines of this country. . . . The answer to [this] problem is not to pervert the collective bargaining process by reading into its instruments a liability which was never contemplated and duties which were never assumed in fact or in theory. To saddle labor unions with liability for the mine operators' failure to comply with standards introduced into the contract at the union's bidding would simply be to discourage the inclusion of similar and more effective standards in later contracts. Such result would not serve the interest of miners and would retard rather than advance the goals of the National Labor policy.

Bryant, 467 F.2d at 5-6 (footnote omitted).

While these arguments are persuasive, we have previously pointed out the distinction between this case which does not claim the union is responsible for the safety of the workplace and those cases which do. This case cannot be said to intrude upon federal labor policy. The history of the development of craft workers has involved training of apprentices, promotions to journeymen and then to craftsmen based on experience and expertise. Unions have protected seniority and differential wage rates based on this system. In this case the union is charged with the responsibility of assuring that the worker can cope with the dangers inherent in the workplace. The undertaking of this responsibility is between the union and the worker and does not implicate national labor policy.

As we have demonstrated, the duty of fair representation has nothing directly to do with training for job safety. It is concerned with arbitrary or discriminatory conduct toward individual employees, which is violative of the union's statutory obligations inherent in its status as a bargaining representative for the worker. That the duty of fair representation has no direct relation to training for job safety is evidenced by the fact that plaintiff in this case does not have a cause of action for breach of a fair representation duty. The balancing undertaken by the *House* and *Bryant* courts essentially involved a policy making/legislative function which balanced the pros and cons of a state's attempt to proscribe a union's negligence regarding job safety. Admittedly, these courts concluded that allowing suits for negligence have a negative impact upon federal labor policy. However, these conclusions were reached without properly focusing on the issue involved in any preemption analysis, that is, is the activity which the state seeks to regulate an activity that Congress has delegated to the board or the state and federal courts under federal labor law. As we have discussed above, tortious conduct by a union against one of its members is simply not an activity that falls within the exclusive realm of federal labor law. Accordingly, we refuse to find that this policy rationale alone is sufficient to warrant preemption of the plaintiff's negligence suit.

Returning to the plaintiff's complaint we find that its allegations against the union sound in tort law and do not make out a duty of fair representation/§ 301 claim. Accordingly, because federal labor law was not invoked in plaintiff's complaint, the federal court lacks jurisdiction and removal was improvidently granted by the district court. We direct that the case be remanded to the state tribunal for adjudication on the merits. What we have discussed herein relates only to the preemption issue and we intimate no opinion with respect to the sufficiency of the complaint.

REVERSED and REMANDED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5799

SALLY HECHLER,
Plaintiff-Appellant,

versus

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and unincorporated association, LOCAL 759 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO SYSTEM COUNCIL U-4, an unincorporated association,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion September 30, 11 Cir., 1985, —— F.2d. ——).

[Filed Nov. 14, 1985]

Before HENDERSON, CLARK and TUTTLE, Circuit Judges.

PER CURIAM:

The Petition for Rehearing/APPELLEES is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas A. Clark
United States Circuit Judge

APPENDIX D

IN THE CIRCUIT COURT
OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

Case No. 84-03434

SALLY HECHLER,

Plaintiff,

vs.

THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO, an unincorporated association, and LOCAL 759 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO, SYSTEM COUNCIL U-4, an unincorporated association,

Defendants.

COMPLAINT

The Plaintiff, SALLY HECHLER, herewith sues the Defendants, THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO, an unincorporated association (hereinafter referred to as INTERNATIONAL BROTHERHOOD) and LOCAL 759 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO, SYSTEM COUNCIL U-4, an unincorporated association (hereinafter referred to as LOCAL 759) and states as follows:

1. At all times pertaining hereto, the Plaintiff, SALLY HECHLER, was a resident of Broward County, Florida.

2. The Defendants, INTERNATIONAL BROTHERHOOD and LOCAL 759, are both unincorporated associations, at all times herein doing business in Broward

County, Florida, by having agents herein entering into contracts herein, and/or conducting daily business activities herein.

3. On or about the 11th day of January, 1982, the Plaintiff, SALLY HECHLER, was employed by Florida Power and Light Company (Florida Power) as an electrical apprentice, and, on said date, and prior thereto, was a dues-paying member of the Defendants, INTERNATIONAL BROTHERHOOD, and LOCAL 759, the said Defendants acting during these times as your Plaintiff's union and representative with Florida Power.

4. The Defendants, and each of them, pursuant to contracts and agreements entered into by and between these said Defendants and the said Florida Power, to which contracts and agreements the Plaintiff was a third-party beneficiary, and pursuant to the relationship by and between the said Defendants and the Plaintiff whereby the Plaintiff, SALLY HECHLER, was a dues-paying member of the said Defendants, the Defendants owed the Plaintiff the duty to assure that the Plaintiff was provided safety in her work place and a safe work place, and further, the Plaintiff would not be required or allowed to take undue risks in the performance of her duties which were not commensurate with her training and experience or to work in an area which was not safe as commensurate with her training and experience.

5. On or before the 11th day of January, 1982, your Plaintiff, SALLY HECHLER, was assigned by Florida Power to work at an electrical substation, operated by the said Florida Power, located in Broward County, Florida. Prior to said assignment, the said SALLY HECHLER had not received sufficient, adequate, or proper training and experience to be exposed to the high risks and dangerous conditions involved in such an inherently dangerous work place as an electrical substation.

6. Your Plaintiff, SALLY HECHLER, did not have the necessary nor required training, background, educa-

tion, or experience to work in such an inherently dangerous work place as an electrical substation, but, despite this, the Defendants, and each of them, breached their duty and were consequently negligent to your Plaintiff, SALLY HECHLER, by allowing her to be assigned to work in and allowing her to actually work in such a dangerous location and environment and by failing to provide her with or ascertaining that she had the necessary training, experience, background, and education to work in such a dangerous environment, or ascertaining prior to her employer, Florida Power, placing her in such a dangerous environment, that she received the necessary education, background, training, and experience. Further, the Defendants were further negligent when they did not take any actions to protect your Plaintiff, SALLY HECHLER, from the risks inherent in such an inherently dangerous environment by providing and/or enforcing safety rules, regulations and requirements which would preclude such persons with inadequate and insufficient background, training, education, and experience, such as the Plaintiff, SALLY HECHLER, from being placed in such an inherently dangerous working environment, such as an electrical substation.

7. On or about the 11th day of January, 1982, your Plaintiff, SALLY HECHLER, was seriously, severely, and permanently injured when she came into contact with highly energized components of the said Florida Power electrical substation in Broward County, Florida, while working in said substation for Florida Power, all of which was a direct and proximate result of the negligence of the Defendants, and both of them.

8. As a direct and proximate result of the negligence of the Defendants, and both of them, as aforesaid, your Plaintiff, SALLY HECHLER, was seriously and severely injured in and about her body and mind, and was thereby rendered sick, sore, lame, and otherwise disabled.

9. As a further direct and proximate result of the negligence of the Defendants, and both of them, as afore-

said, your Plaintiff, SALLY HECHLER, has in the past undergone, and will in the future undergo, painful and extensive medical care and treatment, and she has in the past, and will in the future, incur medical bills and expenses, and the injuries so complained of by her are permanent in nature.

10. As a further direct and proximate result of the negligence of the Defendants, your Plaintiff, SALLY HECHLER, has in the past sustained, and will in the future sustain, loss of earnings and earning capacity.

WHERFORE, Plaintiff, SALLY HECHLER, demands Judgment against the Defendants, THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO, an unincorporated association, and LOCAL 759 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO, SYSTEM COUNCIL U-4, an unincorporated association, in an amount in excess of FIVE THOUSAND DOLLARS ($5,000.00), exclusive of their interest and costs, which they pray for in addition thereto.

DEMAND FOR JURY TRIAL

The Plaintiff in the above-styled cause hereby demand a trial by jury of all the issues triable by right.

LAW OFFICES JACK LAMARR
312 S.E. 17th Street
Ft. Lauderdale, FL 33316
(305) 525-5158
Co-Counsel for Plaintiff

SHELDON J. SCHLESINGER, P.A.
Attorneys for Plaintiff
1212 Southeast Third Avenue
Fort Lauderdale, Florida 33316
(305) 467-8800/945-0722

By: _____
SHELDON J. SCHLESINGER

Supreme Court, U.S.
FILED
APR 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-1360

In the Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and LOCAL 759 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, SYSTEM COUNCIL U-4,

Petitioners,

v.

SALLY HECHLER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOEL S. PERWIN
(Counsel of Record)
PODHURST, ORSECK, PARKS, JOSEFSBERG, EATON, MEADOW & OLIN, P.A.
Suite 800, City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800
Counsel for Respondent

E. L. MINDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

20 pp

QUESTION PRESENTED

Does §301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185, under the Supreme Court's decision in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. ....., 105 S. Ct. 1904, 85 L. Ed.2d 206 (1985), pre-empt a state-law tort action for the negligent performance by a union of a duty to an individual worker prescribed by the collective bargaining agreement?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW 1
ARGUMENT 1
CONCLUSION 15

TABLE OF CASES AND AUTHORITIES

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 8
Allis-Chalmers Corp. v. Lueck, 471 U.S. ....., 105 S. Ct. 1904, 85 L. Ed.2d 206 (1985) .....*passim*
Banfield v. Addington, 104 Fla. 661, 140 So. 893 (1932) 9
Belknap, Inc. v. Hale, 463 U.S. 491 (1983) 2
Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983) 5, 13
Bowen v. United States Postal Service, 459 U.S. 212 (1983) 10
Brown Transport Corp. v. Atcon, Inc., 439 U.S. 1014 (1978) 14
Brown v. Hotel and Restaurant Employees, 468 U.S. ....., 104 S. Ct. 3179, 82 L. Ed.2d 373 (1984) 4
Cavins v. Aetna Life Ins. Co., 609 F. Supp. 309 (E.D. Wisc. 1985) 10
De Veau v. Braisted, 363 U.S. 144 (1960) 4, 5
Farmer v. United Brotherhood of Carpenters, 430 U.S. 290 (1977) 2, 5, 13
Gallichio v. Corporate Group Service, Inc., 227 So.2d 519 (Fla. 3rd DCA 1969) 9
Helton v. Hake, 386 F. Supp. 1027 (W.D. Mo. 1974) 9
Helton v. Hake, 564 S.W.2d 313 (Mo. Ct. App.), *cert. denied*, 439 U.S. 959 (1978) 9
Hillard v. Dobelman, 774 F.2d 886 (8th Cir. 1985) 10

Holbrook v. Sarasota, 58 So.2d 862 (Fla. 1952) 9
International Union, UAA v. Russell, 356 U.S. 634 (1958) 2
International Union, UAW v. Hinz, 218 F.2d 664 (6th Cir. 1955) (per curiam) 5
Johnson v. Hussman Corp., 610 F. Supp. 757 (E.D. Mo. 1985) 10
Lancaster v. Norfolk and Western R. Co., 773 F.2d 807 (7th Cir. 1985) 10
Linn v. Plant Guard Workers of America, 383 U.S. 53 (1966) 2, 13
Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) 3, 8, 10
Local 20, Teamsters Union v. Morton, 377 U.S. 252 (1964) 2
Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976) 2
Malone v. Kitchens of Sara Lee, 613 F. Supp. 1074 (N.D. Ill. 1985) 10
Malone v. White Motor Corp., 435 U.S. 497 (1978) 3, 13
Marine Transport Lines, Inc., 609 F. Supp. 282 (S.D. N.Y. 1985) 10
Michigan Mutual Ins. Co. v. United Steelworkers of America, 774 F.2d 104 (6th Cir. 1985) (per curiam) 11, 12, 13, 15
Mitchel v. Pepsi-Cola Bottlers, Inc., 772 F.2d 342 (7th Cir. 1985) 10
Muenchow v. Parker Pen Co., 615 F. Supp. 1405 (W.D. Wisc. 1985) 10
Nicholson v. Amalgamated Life Ins. Co., 616 F. Supp. 318 (S.D. Miss. 1985) 10

Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) 3

Robertson v. Deak Perera (Miami), Inc., 396 So.2d 749 (Fla. 3rd DCA), *review denied*, 407 So.2d 1105 (Fla. 1981) 9

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 2

Schauer v. Blair Construction Co., 374 So.2d 1160 (Fla. 4th DCA 1979) 9

Sears-Roebuck and Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978) 2, 4, 5

Smith v. Evening News Association, 371 U.S. 195 (1962) 3

Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 10

Strachan v. Union Oil Co., 768 F.2d 703 (5th Cir. 1985) 4, 10

United States Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 (1954) 2

Vaca v. Sipes, 386 U.S. 171 (1967) 1, 5

§301, Labor Management Relations Act of 1947, 29 U.S.C. §185 ..... *passim*

Report of Commission on Revision of the Federal Court Appellate System, 67 F.R.D. 195 (1975) 14

Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Emperical Study*, 59 N.Y.U. L. Rev. 681 (1984) 14, 15

Note, Identification, Tolerability, and Resolution of Intercircuit Conflicts: Reexamining Professor Feeney's Study of Conflicts in Federal Law, 59 N.Y.U. L. Rev. 1007 (1984) 14, 15

No. 85-1360

In the Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and LOCAL 759 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, SYSTEM COUNCIL U-4,

Petitioners,

v.

SALLY HECHLER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The respondent, Sally Hechler, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit in this case. That decision is reported at 772 F.2d 788 (1985), and is reprinted in the Petitioners' appendix at Pet. 11a.

ARGUMENT

Although the Unions present two questions to the Court—invoking the pre-emptive force of both §301 and of their statutory duty of fair representation, *see Vaca v. Sipes*, 386 U.S. 171, 177 (1967)—they later disclaim any contention "that the Eleventh Circuit's . . . conclu-

sion with respect to the preemptive force of the duty of fair representation . . . presents a question that is independently worthy of this Court's attention" (Pet. 11 n.3). For this reason, we need not defend here the Court of Appeals' rejection of the Unions' defense of pre-emption by the duty of fair representation, but will confine our discussion to the Unions' defense of pre-emption under §301.[1]

---

1. This is not to concede the Unions' argument (Pet. 10-11 n.3) that the Court of Appeals erred in holding that Hechler's state action only peripherally implicated the central concern of the labor laws with the relationship between an employer and its employees collectively, because Hechler's complaint challenged not the general safety of the workplace—a matter at the heart of the bargaining relationship between the employer and the union—but only the Unions' failure to protect her individual safety in work assignment—a matter "between the union and the worker [that] does not implicate national labor policy" (Pet. 31a; *see* Pet. 25a n.3, 29a). Although this distinction is easily defensible, we need not debate here the Unions' rejoinder (Pet. 10 n.3), both because the point is not offered as a basis for certiorari, and because it is only one of many upon which the Court of Appeals rejected the Unions' defense of pre-emption by the duty of fair representation.

Among the other bases for that conclusion are 1) that the Unions' negligent conduct was neither prohibited nor protected by the labor laws; 2) that Congress did not intend that conduct which is tortious under state law should be unregulated in the absence of any specific federal prohibition; 3) that Hechler's state claim was only peripherally related to the purposes of federal labor law, primarily because the federal scheme afforded Hechler no practical means of redressing her injury; and 4) that Florida has an obvious interest in redressing common-law negligence. *See generally Belknap, Inc. v. Hale*, 463 U.S. 491, 498-99, 511-12 (1983); *Sears-Roebuck and Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 188 nn.12, 13, 193-94, 196 n.25, 199 n.30, 200, 206-07 (1978); *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 298-305 (1977); *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976); *Linn v. Plant Guard Workers of America*, 383 U.S. 53, 60, 63-64 (1966); *Local 20, Teamsters Union v. Morton*, 377 U.S. 252 (1964); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-48 (1959); *International Union, UAA v. Russell*, 356 U.S. 634, 643, 645-46 (1958); *United States Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 663-68 (1954).

1. The Court of Appeals' Decision in This Case Does Not Conflict With This Court's Decision in Allis-Chalmers Corp. v. Lueck, 471 U.S. ....., 105 S. Ct. 1904, 85 L. Ed.2d 206 (1985).

Allis-Chalmers does not hold that every state-law claim which depends to some extent upon the duties prescribed in a collective bargaining agreement is pre-empted by §301 of the LMRA. To the contrary, *Allis-Chalmers* readily supports the Court of Appeals' decision in this case, for three independent reasons.

First, *Allis-Chalmers* is consistent with the Court's longstanding practice of administering the pre-emption doctrine in the light of any practical potential for conflict between the state and federal systems—not of theoretical possibilities. The central objective of *Allis-Chalmers* is the uniform interpretation of a given labor contract under a single body of law, as against the possibility of conflicting interpretations in the state and federal systems.[2] Thus, 85 L. Ed.2d at 213-14, *Allis-Chalmers* quotes with approval the Court's earlier pronouncement that state regulation is permissible "unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the states." *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). In addition, 85 L. Ed.2d at 214, it quotes with approval the observation in *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962), that "substantive principles of federal law must be paramount *in the area covered by the statute* [so that] issues raised

---

2. 85 L. Ed.2d at 214-15, *quoting Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962). *Accord, Republic Steel Corp. v. Maddox*, 379 U.S. 650, 657 (1965); *Smith v. Evening News Association*, 371 U.S. 195, 200-01 (1962).

in suits *of a kind covered by §301* [are] to be decided according to the precepts of federal labor policy" (our emphasis). These statements counsel a real-world consideration of the extent to which the state-court adjudication of a question would create the possibility of inconsistent outcomes in the federal system.[3]

In the instant case, as the Court of Appeals found, "[n]either the collective bargaining agreement nor §301 provides a remedy" (Pet. 21a). Hechler's claim is that the Unions were negligent in the performance of a contractual obligation, causing personal injury and damages in tort. Although Hechler might theoretically have brought a §301 action for breach of contract, the reality is that she suffered no contract damages, and thus would not have considered wasting her time to bring such an action. Nor is there any realistic danger of a federal-court interpretation of the contract clause at issue in any other context. As the Unions have admitted throughout these proceedings, the collective-bargaining agreement in question does not provide a grievance or arbitration procedure through which an individual worker like Sally Hechler might challenge her work assignment or training.

---

3. *See Strachan v. Union Oil Co.*, 768 F.2d 703, 705 (5th Cir. 1985) (reading *Allis-Chalmers* to hold that plaintiffs cannot employ a tort claim "in substitution for their rights under the collective bargaining agreement"). For analogous reasoning in other labor-law pre-emption contexts, *see De Veau v. Braisted*, 363 U.S. 144, 152 (1960) (plurality opinion) ("Would Congress, with a lively regard for its own federal labor policy, find in this state enactment a true, real frustration, however dialectically plausible, of that policy?"), *quoted in Brown v. Hotel and Restaurant Employees*, 468 U.S. ....., 104 S.Ct. 3179, 82 L. Ed.2d 373, 387 (1984); *Sears-Roebuck and Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 201 (1978) (the question is not whether it is "theoretically possible" that an issue may be decided in two forums, but whether there is "in fact" a "risk of overlapping jurisdiction"). As the Court acknowledged in *Allis-Chalmers*, 85 L. Ed.2d at 216 n.6, such cases at least "involve[] considerations related to . . . those at issue here."

Compare *Allis-Chalmers,* 85 L. Ed.2d at 210, 212, in which the plaintiff did have a grievance procedure available, but chose not to invoke it. In addition, as both parties have acknowledged throughout, Hechler has no claim that the Unions breached their duties of fair representation, in the absence of any evidence of arbitrary or discriminatory conduct by the Unions.[4]

As in *De Veau v. Braisted, supra* note 3, the appropriate question is whether the mere theoretical availability of such a §301 suit, "however dialectically plausible," constitutes a sufficiently "true, real frustration" to imply a Congressional intention to pre-empt. The *Allis-Chalmers* opinion acknowledges the propriety of that question, and thus of its consideration by the Court of Appeals in this case. For this reason, there is no conflict with *Allis-Chalmers,* even if the Court of Appeals in this case may have answered that question incorrectly, which of course we dispute.

Second, the *Allis-Chalmers* decision acknowledges the delicate balance between state and federal interests,[5] in holding *not* that "every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement, or more generally to the parties to such an agreement, necessarily is pre-empted by §301," but that pre-emption is appropriate only "when resolution of a

---

4. *See Vaca v. Sipes,* 386 U.S. 171, 190 (1967). For the same reason, Hechler had no administrative remedy before the NLRB. *See International Union, UAW v. Hinz,* 218 F.2d 664, 665 (6th Cir. 1955) (per curiam).

5. *See generally Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 731, 741-42 (1983); *Sears-Roebuck & Co. v. San Diego County District Council of Carpenters,* 436 U.S. 180, 196 n.25 (1978); *Farmer v. United Brotherhood of Carpenters,* 430 U.S. 290, 304 (1977).

state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract . . . ." 85 L. Ed.2d at 221. As a way of administering this test of substantial dependency—of determining which state-law claims are sufficiently rooted in fundamental state policies to survive pre-emption—the *Allis-Chalmers* decision focuses on the extent to which the state cause of action may be waived or modified by the collective-bargaining contract, 85 L. Ed.2d at 215-16, 218, 219 & n.11:

> Of course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by §301 or other provisions of the federal labor law. Section 301 on its face says nothing about the substance of what private parties may agree to in a labor contract. Nor is there any suggestion that Congress, in adopting §301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored. Clearly, §301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of §301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.

Therefore, state-law rights and obligations that do not exist independently of private agreements, and

that as a result can be waived or altered by agreement of private parties, are pre-empted by those agreements. . . . Our analysis must focus, then, on whether the Wisconsin tort action for breach of the duty of good faith as applied here confers non-negotiable state law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the contract.

* * *

[I]f the arbitrator ruled that the labor agreement did *not* provide such relief expressly or by implication, that too should end the dispute, for under Wisconsin law there is nothing that suggests that it is not within the power of the parties to determine what would constitute "reasonable" performance of their obligations under an insurance contract.

* * *

[T]here is no indication in Wisconsin law that the tort is anything more than a way to plead a certain kind of contract violation in tort in order to recover exemplary damages not otherwise available under Wisconsin law. . . . Therefore, under Wisconsin law it appears that the parties to an insurance contract are free to bargain about what "reasonable" performance of their contract obligation entails. That being so, this tort claim is firmly rooted in the expectations of the parties that must be evaluated by federal contract law.

* * *

We pass no judgment on whether an independent, non-negotiable, state-imposed duty which does not create

similar problems of contract interpretation would be pre-empted under similar circumstances.[6]

In *Allis-Chalmers,* the state bad-faith claim was wholly dependent—not only for its scope but for its very existence—upon the terms of the contract. As the Court stated directly, 85 L. Ed.2d at 219, the tort claim was nothing "more than a way to plead a certain kind of contract violation . . . ." *See id.* at 220 n.12. Thus, the state-law claim could be "waived or altered by agreement," 85 L. Ed.2d at 216—for example, by prescribing rules concerning the speed with which, or the manner in which, insurance claims might be processed. As in *Local 174, Teamsters v. Lucas Flour Co.,* 369 U.S. 95, 104 (1962), "[w]hether [the defendant's conduct] was a violation of the collective bargaining contract is thus the ultimate issue which this case presents."

The instant case is different. In this case, as the Court of Appeals found (Pet. 21a), "[t]hough the contract may be of use in defining the scope of the duty owed, liability will turn on basic negligence principles as developed by state law." Although the contract in question admittedly defines the nature and scope of the

---

6. *See also Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 50, 52 (1974), *quoted in Allis-Chalmers,* 85 L. Ed.2d at 216 n.8. The Court noted in *Alexander*: "Where the statutory right underlying a particular claim may not be abridged by contractual agreement, the Court has recognized that consideration of the claim by the arbitrator as a contractual dispute under the collective-bargaining agreement does not preclude subsequent consideration of the claim by the National Labor Relations Board as an unfair labor practice charge or as a petition for clarification of the union's representation certificate under the Act." The Court added: "Both rights have legally independent origins and are equally available to the aggrieved employee."

Unions' duties,[7] it does not, and cannot, abrogate the Unions' independent state-law obligation to perform those duties in a reasonable way. The contract can *define* what is reasonable, but it cannot *absolve* what it defines as unreasonable. That obligation exists independent of the contract—no matter what duties the contract prescribes—and by definition cannot be abrogated by contract.

As the Court of Appeals recognized in this case, that is the dispositive difference: "[T]he fact that some deference to a collective bargaining agreement must be made in order to define the scope of the union's duty does not automatically lead to the conclusion that a suit in negligence must be interpreted as no more than a §301 action and therefore is preempted." The *Allis-Chalmers* decision is consistent with that conclusion, in acknowledging that pre-emption is inappropriate if the state action exists "independently of private agreements," and cannot "be waived or altered by agreement of private parties . . . ." 85 L. Ed. 2d at 216. That is precisely the case here. Although the nature and scope of the Unions' duties are defined by the contract, that agreement does not and cannot abrogate independent state-law duties to perform those obligations

---

7. Florida recognizes a common-law duty to exercise reasonable care in the performance of an express or implied contract. *Schauer v. Blair Construction Co.*, 374 So.2d 1160 (Fla. 4th DCA 1979). *See Robertson v. Deak Perera (Miami), Inc.*, 396 So.2d 749 (Fla. 3rd DCA), *review denied*, 407 So.2d 1105 (Fla. 1981). The violation of such a duty gives the plaintiff an election to proceed in tort or in contract. *Holbrook v. Sarasota*, 58 So.2d 862 (Fla. 1952). If negligence is the gravamen of the cause of action, then the action is treated as an action in tort, and the contract is significant only because it created the legal duty assertedly breached. *Banfield v. Addington*, 104 Fla. 661, 140 So. 893 (1932); *Gallichio v. Corporate Group Service, Inc.*, 227 So.2d 519 (Fla. 3rd DCA 1969). *See generally Helton v. Hake*, 386 F. Supp. 1027, 1033 (W.D. Mo. 1974); *Helton v. Hake*, 564 S.W.2d 313, 317 (Mo. Ct. App.), *cert. denied*, 439 U.S. 959 (1978).

in a non-negligent way. The instant case is perfectly consistent with *Allis-Chalmers*. *See Muenchow v. Parker Pen Co.*, 615 F. Supp. 1405, 1414-15 (W.D. Wisc. 1985).

Third, *Allis-Chalmers* concludes that "[p]erhaps the most harmful aspect" of permitting the state action is that it would have adjudicated the dispute "without first exhausting the grievance procedures established in the bargaining agreement." 85 L. Ed.2d at 220. Thus, only "[the] result [in *Allis-Chalmers*] preserves the central role of arbitration in our 'system of industrial self-government.'" *Id., quoting Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960).[8]

In this case, as the Unions have acknowledged throughout, and as the Court of Appeals found, the collective bargaining agreement provided Hechler no grievance procedure, no arbitration procedure, and no means of redress:

> Moreover, the collective bargaining contract in [*Allis-Chalmers*] itself provided the remedy—arbitration—for a breach. Here, the plaintiff's claim is essentially

---

8. *See Bowen v. United States Postal Service*, 459 U.S. 212, 225 (1983); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962). A number of cases decided since *Allis-Chalmers* rely upon this factor. *See, e.g., Hillard v. Dobelman*, 774 F.2d 886, 887 (8th Cir. 1985); *Lancaster v. Norfolk and Western R. Co.*, 773 F.2d 807, 816 (7th Cir. 1985) (attributing to *Allis-Chalmers* the holding that "[w]here, as is true of over 90% of such contracts, the contract establishes a grievance and arbitration remedy, that remedy becomes by force of section 301 exclusive, just like the arbitral remedies established by the Railway Labor Act"); *Mitchel v. Pepsi-Cola Bottlers, Inc.*, 772 F.2d 342, 345 (7th Cir. 1985); *Strachan v. Union Oil Co.*, 768 F.2d 703, 705 (5th Cir. 1985); *Nicholson v. Amalgamated Life Ins. Co.*, 616 F. Supp. 318, 319 (S.D. Miss. 1985); *Muenchow v. Parker Pen Co.*, 615 F. Supp. 1405, 1410 (W.D. Wisc. 1985); *Malone v. Kitchens of Sara Lee*, 613 F. Supp. 1074, 1075 (N.D. Ill. 1985); *Johnson v. Hussman Corp.*, 610 F. Supp. 757, 758 (E.D. Mo. 1985); *Cavins v. Aetna Life Ins. Co.*, 609 F. Supp. 309, 313 (E.D. Wisc. 1985); *Marine Transport Lines, Inc.*, 609 F. Supp. 282, 287 (S.D.N.Y. 1985).

one of common law negligence for breach of a duty of care. Neither the collective bargaining agreement nor §301 provides a remedy (Pet. 21a).

In concluding the the plaintiff's ability to circumvent contracted-for arbitration procedures was "[p]erhaps the most harmful aspect" of permitting the state action, the *Allis-Chalmers* opinion does not suggest what the outcome would have been in the absence of such available procedures. As we have noted, the central inquiry is whether the state adjudication creates a realistic threat of inconsistent contractual interpretations in alternative forums. In the absence of an available grievance procedure in the federal system, such a possibility is remote. Nothing in *Allis-Chalmers* suggests otherwise, and thus the Court of Appeals' decision in this case does not conflict.

2. The Court of Appeals' Decision in This Case Does Not Conflict With the Decision in Michigan Mutual Ins. Co. v. United Steelworkers of America, 774 F.2d 104 (6th Cir. 1985) (per curiam).

Unlike the instant case, *Michigan Mutual* did not involve a claim that the union had breached a contractual duty owed to an individual employee—for example, to insure that he was properly trained for the job to which he was assigned, or assigned to a job for which he was properly trained. To the contrary, *Michigan Mutual* involved the asserted breach of a contractual duty owed to *all* of the union members—"to provide safety services to its members." 774 F.2d at 104. Thus, the complaint charged not that the union had failed to accommodate the needs of a specific worker, but rather that "it had failed, as exclusive bargaining representative for [the company's] employees, to require [the company] to re-

move the shanty, allegedly a known hazardous condition, from the plant." *Id.* at 105.

In the instant case, the Court of Appeals expressly acknowledged this distinction, reserving for another day the question of whether pre-emption might be appropriate in a case such as *Michigan Mutual* (Pet. 29a, 31a):

> This case is distinguishable from the cases previously described in which the plaintiff sought relief from the union for a breach of its general duty to inspect for safety for the benefit of the entire work force in the workplace pursuant to the collective bargaining agreement. . . . In the present case the plaintiff alleges a duty running from the union to her individually that required the union to assure that she was first qualified to work in a dangerous substation on the job assigned to her prior to her assignment. The plaintiff does not claim the union was responsible for making the substation safe for all of the workers.
>
> * * *
>
> [W]e have previously pointed out the distinction between this case which does not claim the union is responsible for the safety of the workplace and those cases which do. This case cannot be said to intrude upon federal labor policy. The history of the development of craft workers has involved training of apprentices, promotions to journeymen and then to craftsmen based on experience and expertise. Unions have protected seniority and differential wage rates based on this system. In this case the union is charged with the responsibility of assuring that the worker can cope with the dangers inherent in the workplace. The undertaking of this responsibility is

between the union and the worker and does not implicate national labor policy.

The Unions or the Court might disagree with this purported distinction between the instant case and cases like *Michigan Mutual*. The relevant point, however, is that the Court of Appeals in this case expressly reserved for another day its resolution of cases like *Michigan Mutual*, and thus the two cases cannot be in conflict.[9]

---

9. It might be argued that the Court of Appeals drew this distinction only in rejecting the defense of pre-emption by the duty of fair representation—which requires a balancing of all relevant interests, including the relative importance of the issue to the central objectives of the labor laws—but did not purport to accept such a distinction in rejecting the defense of pre-emption under §301. We acknowledge the difference between the two defenses, *see Allis-Chalmers*, 85 L. Ed.2d at 217 n.9, but as we have noted, §301 pre-emption also requires a determination of the practical likelihood of conflicting interpretations in the state and federal systems, and thus of a Congressional intention to pre-empt. *See Id.* at 213-14, *quoting Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). In this context, the Court of Appeals' distinction—between a case on the one hand in which the union might invoke §301 to seek *preventive* relief on behalf of its membership to insure the safety of the workplace, and on the other hand a case like this one, in which a single worker seeks *remedial* relief after suffering an injury—becomes meaningful. In the fair-representation context, this Court repeatedly has emphasized that even if the plaintiff had a preventive federal remedy before suffering an injury, that recognition does not alone preclude a state action for redress of injury already incurred. *See Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 742 (1983), *citing Linn v. Plant Guard Workers*, 383 U.S. 53, 63 (1966); *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 298 (1977). In light of the foregoing, the same distinction seems equally available in opposing a defense of pre-emption under §301. For this reason, there is at least a significant question whether the Court of Appeals which decided the instant case would agree with the outcome of *Michigan Mutual* under analogous facts.

3. Even if the Court of Appeals' Decision in This Case Did Conflict With Michigan Mutual, That Would Not Provide a Sufficient Basis for Review by This Court.

The Unions appear to assume that the mere demonstration of a two-circuit conflict is sufficient to warrant review by this Court. Thus, the Unions make no attempt to demonstrate that any other circuits have spoken to the question at issue, that the asserted two-circuit conflict presents an opportunity for forum shopping, or that the instant decision is otherwise appropriate for review by this Court. They thus ignore the fact that this Court denies certiorari in the vast majority of cases presented which reflect a two-circuit conflict.[10]

Whether one applauds or laments the Court's inability to resolve all two-circuit conflicts, it is an unavoidable reality that choices must be made, and the Unions have failed at the threshold to offer any persuasive reason for acceptance of certiorari by this Court. To the contrary, since the asserted two-circuit conflict concerns the interpretation of a very-recent (1985) decision by this Court, and since only two circuits have purportedly interpreted that decision in the particular context at issue here, it would seem that the arguments for percolation—for additional input by other courts which might induce one or the other of the assertedly-conflicting courts to

---

10. *See Brown Transport Corp. v. Atcon, Inc.*, 439 U.S. 1014 (1978) (White, J., dissenting from the denial of certiorari); Report of Commission on Revision of the Federal Court Appellate System, 67 F.R.D. 195 (1975) (appendix); Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Emperical Study*, 59 N.Y.U. L. Rev. 681, 784-87 (1984); Note, *Identification, Tolerability, and Resolution of Intercircuit Conflicts: Reexamining Professor Feeney's Study of Conflicts in Federal Laws*, 59 N.Y.U. L. Rev. 1007, 1007-08 (1984).

rethink its position—are particularly strong.[11] The Unions have suggested no countervailing detriment to the tolerance of such a period of percolation—like the threat of forum shopping—and we can imagine none. In light of the many two-circuit conflicts which this Court must decline to review, the Unions have offered no compelling reason for the Court to resolve the conflict asserted here.[12]

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JOEL S. PERWIN
(Counsel of Record)
PODHURST, ORSECK, PARKS, JOSEFSBERG,
EATON, MEADOW & OLIN, P.A.
Suite 800, City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800
Counsel for Respondent

---

11. *See Estreicher & Sexton, supra,* 59 N.Y.U. L. Rev. at 725-27; Note, *supra,* 59 N.Y.U. L. Rev. at 1019-21, 1025-27.

12. Finally, we respectfully submit that in light of the foregoing arguments, if the Court of Appeals' decision in this case does conflict with *Michigan Mutual,* it seems clear that the Court of Appeals' decision constitutes the correct and appropriate interpretation of *Allis-Chalmers*—and thus that the *Michigan Mutual* decision is erroneous. For this reason, although it might at some point be advisable for the Court to resolve the asserted conflict, this case is not the appropriate vehicle. It would be more appropriate for this Court to accept review of the *Michigan Mutual* decision, should the parties seek such review.

(3)

Supreme Court, U.S.
FILED
AUG 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and LOCAL 759 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, SYSTEM COUNCIL U-4,
Petitioners,

v.

SALLY HECHLER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

JOINT APPENDIX

LAURENCE J. COHEN
SHERMAN, DUNN, COHEN, LEIFER AND COUNTS, P.C.
Suite 801
1125 15th Street, N.W.
Washington, D.C. 20005
(202) 785-9300
Counsel for Petitioners

JOEL S. PERWIN
PODHURST, ORSECK, PARKS, JOSEFSBERG, EATON, MEADOW & OLIN, P.A.
Suite 800 City National Bank Bldg.
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800
Counsel for Respondent

PETITION FOR CERTIORARI FILED FEBRUARY 12, 1986
CERTIORARI GRANTED MAY 19, 1986

22pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1360

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and LOCAL 759 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, SYSTEM COUNCIL U-4,

Petitioners,

v.

SALLY HECHLER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

TABLE OF CONTENTS

	Page
Notation regarding decisions below	ii
Relevant Docket Entries	1
District Court	1
Court of Appeals	2
Complaint	3
Excerpts from Memorandum of Agreement Between Florida Power and Light Company and International Brotherhood of Electrical Workers	7

The following opinions and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Order of Dismissal of the District Court for the Southern District of Florida, dated July 24, 1984 ..... 1a

Opinion of the Court of Appeals for the Eleventh Circuit, dated September 30, 1985 ..... 11a

Order of the Court of Appeals for the Eleventh Circuit denying petition for rehearing and suggestion for rehearing en banc entered on November 14, 1985..... 33a

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

DATE	NR.	PROCEEDINGS
1984		
Mar. 13	1	JOINT Petition for removal
13	2	NOTICE of Removal
Jun. *5	16	MOTION to dismiss, by Deft. International
*5	17	MEMORANDUM of points and authorities in support of the Motion to dismiss
25	19	MOTION to dismiss of Local 759 of the International Brotherhood etc.
July 2	22	REPLY to defts' motion to dismiss, by Pltf.
2	24	MEMORANDUM of law in opposition to defts' motions to dismiss, by Pltf.
24	26	ORDER (JAG7/24/84) Cause is DISMISSED because the Pltf. failed to file suit within the prescribed time frame (EOD7/26/84)
Aug. 3	27	MOTION for reconsideration and relief to file amended complaint, by Pltf.
3	28	MEMORANDUM in support of Pltf's motion for reconsideration and relief to file amended complaint, by Pltf.
13	29	RESPONSE to motion for reconsideration by local 759 of the International Brotherhood of Electrical Workers etc.
22	30	*NOTICE OF APPEAL* filed by Pltf. from Order of Dismissal entered 6/22/84. COPIES TO USCA; ESTER, ESQ.; SUGARMAN, ESQ.; RESNICH, ESQ. & LaMARR, ESQ.)

DATE	NR.	PROCEEDINGS
1984		
Oct. 3	31	NOTICE OF APPEAL filed by Pltf. from Order of dismissal entered 7/24/84 and from Order denying motion for reconsideration entered 9/5/84. (COPIES TO USCA; ESTER, ESQ.; SUGARMAN, ESQ.; RESNICK, ESQ; LAMARR, ESQ. and KATHY GOULD)
Sep. 5	32	ORDER (JAG) Pltf's motion for reconsideration of order of dismissal DENIED. (EOD 10/9/84) *THIS PLEADING MISSING FROM FILE*
Nov. 15	—	*SUPPLEMENTAL RECORD ON APPEAL TRANSMITTED TO USCA* 1 Vol. Pleadings

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Volume		Document
I	Original Record on Appeal	1
II	Argument and Submission	2
	Opinion, September 30, 1985	3
	Judgment, September 30, 1985	4
	Order Denying Rehearing, November 14, 1985	5
	Clerk's Certificate	6

IN THE CIRCUIT COURT
OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

Case No. 84-03434

SALLY HECHLER,

Plaintiff,

vs.

THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO, an unincorporated association, and LOCAL 759 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO, SYSTEM COUNCIL U-4, an unincorporated association,

Defendants.

COMPLAINT

The Plaintiff, SALLY HECHLER, herewith sues the Defendants, THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO, an unincorporated association (hereinafter referred to as INTERNATIONAL BROTHERHOOD) and LOCAL 759 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO, SYSTEM COUNCIL U-4, an unincorporated association (hereinafter referred to as LOCAL 759) and states as follows:

1. At all times pertaining hereto, the Plaintiff, SALLY HECHLER, was a resident of Broward County, Florida.

2. The Defendants, INTERNATIONAL BROTHERHOOD and LOCAL 759, are both unincorporated associations, at all times herein doing business in Broward County, Florida, by having agents herein entering into

contracts herein, and/or conducting daily business activities herein.

3. On or about the 11th day of January, 1982, the Plaintiff, SALLY HECHLER, was employed by Florida Power and Light Company (Florida Power) as an electrical apprentice, and, on said date, and prior thereto, was a dues-paying member of the Defendants, INTERNATIONAL BROTHERHOOD, and LOCAL 759, the said Defendants acting during these times as your Plaintiff's union and representative with Florida Power.

4. The Defendants, and each of them, pursuant to contracts and agreements entered into by and between these said Defendants and the said Florida Power, to which contracts and agreements the Plaintiff was a third-party beneficiary, and pursuant to the relationship by and between the said Defendants and the Plaintiff whereby the Plaintiff, SALLY HECHLER, was a dues-paying member of the said Defendants, the Defendant owed the Plaintiff the duty to assure that the Plaintiff was provided safety in her work place and a safe work place, and further, the Plaintiff would not be required or allowed to take undue risks in the performance of her duties which were not commensurate with her training and experience or to work in an area which was not safe as commensurate with her training and experience.

5. On or before the 11th day of January, 1982, your Plaintiff, SALLY HECHLER, was assigned by Florida Power to work at an electrical substation, operated by the said Florida Power, located in Broward County, Florida. Prior to said assignment, the said SALLY HECHLER had not received sufficient, adequate, or proper training and experience to be exposed to the high risks and dangerous conditions involved in such an inherently dangerous work place as an electrical substation.

6. Your Plaintiff, SALLY HECHLER, did not have the necessary nor required training, background, education, or experience to work in such an inherently danger-

ous work place as an electrical substation, but, despite this, the Defendants, and each of them, breached their duty and were consequently negligent to your Plaintiff, SALLY HECHLER, by allowing her to be assigned to work in and allowing her to actually work in such a dangerous location and environment and by failing to provide her with or ascertaining that she had the necessary training, experience, background, and education to work in such a dangerous environment, or ascertaining prior to her employer, Florida Power, placing her in such a dangerous environment, that she received the necessary education, background, training, and experience. Further, the Defendants were further negligent when they did not take any actions to protect your Plaintiff, SALLY HECHLER, from the risks inherent in such an inherently dangerous environment by providing and/or enforcing safety rules, regulations and requirements which would preclude such persons with inadequate and insufficient background, training, education, and experience, such as the Plaintiff, SALLY HECHLER, from being placed in such an inherently dangerous working environment, such as an electrical substation.

7. On or about the 11th day of January, 1982, your Plaintiff, SALLY HECHLER, was seriously, severely, and permanently injured when she came into contact with highly energized components of the said Florida Power electrical substation in Broward County, Florida, while working in said substation for Florida Power, all of which was a direct and proximate result of the negligence of the Defendants, and both of them.

8. As a direct and proximate result of the negligence of the Defendants, and both of them, as aforesaid, your Plaintiff, SALLY HECHLER, was seriously and severely injured in and about her body and mind, and was thereby rendered sick, sore, lame, and otherwise disabled.

9. As a further direct and proximate result of the negligence of the Defendants, and both of them, as afore-

said, your Plaintiff, SALLY HECHLER, has in the past undergone, and will in the future undergo, painful and extensive medical care and treatment, and she has in the past, and will in the future, incur medical bills and expenses, and the injuries so complained of by her are permanent in nature.

10. As a further direct and proximate result of the negligence of the Defendants, your Plaintiff, SALLY HECHLER, has in the past sustained, and will in the future sustain, loss of earnings and earning capacity.

WHERFORE, Plaintiff, SALLY HECHLER, demands Judgment against the Defendants, THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO, an unincorporated association, and LOCAL 759 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO, SYSTEM COUNCIL U-4, an unincorporated association, in an amount in excess of FIVE THOUSAND DOLLLARS ($5,000.00), exclusive of their interest and costs, which they pray for in addition thereto.

DEMAND FOR JURY TRIAL

The Plaintiff in the above-styled cause hereby demand a trial by jury of all the issues triable by right.

LAW OFFICES JACK LAMAR
312 S.E. 17th Street
Ft. Lauderdale, FL 33316
(305) 525-5158
Co-Counsel for Plaintiff

SHELDON J. SCHLESINGER, P.A.
Attorneys for Plaintiff
1212 Southeast Third Avenue
Fort Lauderdale, Florida 33316
(305) 467-8800/945-0722

By: _____
SHELDON J. SCHLESINGER

MEMORANDUM OF AGREEMENT

between

FPL [SEAL]

FLORIDA POWER & LIGHT COMPANY

and

[SEAL]

AFL-CIO

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS

1982-1983

[LOGO]

ARTICLE I

GENERAL CONDITIONS

1. RECOGNITION AND REPRESENTATION

The Company recognizes the rights of its employees to organize and to bargain collectively through representatives of their own choosing. The Union is hereby recognized as the exclusive collective bargaining representative with respect to rates of pay, hours of work, and other conditions of employment for all employees of the Company working in the classifications listed in Exhibit "A" attached hereto, except as otherwise provided in Paragraph 3 hereinafter. The Company agrees to meet and deal with the duly accredited officers, committee or representatives of the Union on all matters covered by the terms of this Agreement.

2. PROBATIONARY PERIOD

All new employees employed in any of the classifications in Exhibit "A" shall be considered employed on a probationary basis for a period of the first six (6) months of continuous employment. During such period such employees shall receive at least the minimum of the rate range of the classification in which they are employed. During the probationary period such employees must show an aptitude for the work in which they are engaged and the ability and desire to advance to the skilled classifications. During this probationary period, the Company may, at its option, transfer, lay off or dismiss such employees. If retained after such period, such employees shall thereafter be considered regular employees and be entitled to all rights and privileges hereunder as such. A probationary employee is neither required to nor prohibited from joining the Union.

* * * *

4. MANAGEMENT IN COMPANY

The right to hire, promote, suspend, lay off, demote, assign, reassign, discipline, discharge and reemploy employees and the management of the properties of the Company shall be vested exclusively in the Company, and the Company shall have the right to determine how many men it will employ or retain in the operation and maintenance of its business, together with the right to exercise full control and discipline over its employees in the interest of proper service and conduct of its business, subject to any applicable terms of this Agreement.

4.1 COMPANY-FOREMAN RELATIONSHIP

It is agreed that all promotions to and demotions from classifications in the wage bracket of Distribution Dispatcher (DY, FM, SS and CO) and above, as shown in Exhibit "A", will not be subject to the arbitration step provided in the Agreement. It is further agreed that employees in such classifications have definite management responsibilities and are the direct representatives of the Company at their level of work. Employees in these classifications and any otners in a supervisory capacity are not to be jacked up or disciplined through Union machinery for the acts they may have performed as supervisors in the Company's interest. The Union and the Company do not expect or intend for Union members to interfere with the proper and legitimate performance of the Foremen's management responsibilities appropriate to their classification. It is further agreed that the inclusion in the bargaining unit of the employees in the wage bracket of Distribution Dispatcher (DY, FM, SS and CO) and above, and any others who may be in a bonafide supervisory capacity, shall not preclude the Company from having direct communication with such supervisory personnel to the same extent as if they were not included in the bargaining unit.

* * * *

17. QUALIFICATIONS FOR FILLING VACANCIES

In the filling of any jobs, vacancies, and making promotions (the word "promotion" shall mean advancement to a higher job classification), seniority (as defined in Paragraph 15) shall be given full consideration and where ability, skill and qualifications are reasonably equal, seniority (as defined in Paragraph 15) shall control. Final determination of such qualifications shall be made by the Company, except that any dispute which may arise in connection with any such matter shall be handled in accordance with the provisions of Article IV of this Agreement. Any employee who is promoted or transferred shall be given a reasonable time to acquaint himself with the job and prove his ability to fill the position satisfactorily. Should an employee, at the end of such trial period, prove unsatisfactory for the job to which he has been promoted or transferred, he shall be returned to his former position without loss of seniority. Any employee who is awarded a job in an apprentice classification and bids out before he completes the training, will not be allowed to return to that apprentice program until he has successfully completed all the related studies, skills and development in another apprentice program or holds a journeyman's classification.

* * * *

ARTICLE IV

GRIEVANCES—CONFERENCES—ARBITRATION

26. GRIEVANCES DEFINED

A grievance is hereby defined as a violation of the terms of this Agreement or any type of supervisory conduct which unjustly denies to any employee his job or any benefit arising out of his job and notice of which has been given in writing within four (4) calendar weeks after its occurrence.

27. GRIEVANCE HANDLING PROCEDURE

(a) Should any difference arise between an employee covered by this Agreement and a representative of the Company, the employee and/or the Job Steward shall discuss such difference informally with the immediate Supervisor for the purpose of settling differences in the simplest and most direct manner in order to avoid grievances. If, after these discussions, a difference still exists involving a matter referred to in Paragraph 26, unless by mutual agreement in writing signed by both parties another procedure is adopted, such matter shall be taken up in the following manner:

First: The matter may become a formal grievance if reduced to writing, signed by the party making the grievance and taken up with the immediate Supervisor within four (4) calendar weeks after its occurrence.

Second: If any matter is not settled in the First Step within ten (10) days, the Business Manager of the Union and the Vice President in charge of Operations or such representative as either may designate, shall discuss the matter further. The Supervisor and the Local Union Representative may be included in these discussions.

Third: Any matter not settled, as provided in the Second Step above, shall within thirty (30) days after disposal in the First Step above be referred to the President of the Company or his personal representative, and the Business Manager of the Union and the System Committee (which the Union agrees shall consist of not more than four (4) members). A representative of the International President may also be included in this step.

Fourth: Should any matter that has been referred to representatives of the parties, as provided in the Third Step above, not be satisfactorily adjusted within thirty (30) days from the date of such referral, either party may within sixty (60) days from date of such referral

demand arbitration of the matter by giving written notice to the other. Upon the Union requesting arbitration, all such grievances which are not settled within sixty (60) days from the date that no agreement is reached in the Second Step on the first such grievance not settled within that period may be grouped for submission to a single Arbitration Board regardless of the issues involved. In cases where the time limit is extended for handling in the Third Step, such time limit extensions will be added to the sixty (60) day period.

(b) A grievance of a general nature or a grievance in the interpretation of the Agreement which is brought by someone other than an aggrieved employee and is not confined to an individual employee or group of employees in a particular location shall be brought as a grievance of the Union. The Business Manager, or his representative, shall present such grievance in writing to the Vice President in charge of Operations or such representative as he may designate. In the event such grievance is not disposed of within thirty (30) days after presentation, it may be refererd to the parties as provided in the Third Step of the Grievance Handling Procedure.

(c) When any favorable or unfavorable incident occurs to an employee, a record of which is made by the Company, he will be furnished a copy of same within four (4) weeks of its occurrence in order that he may have an opportunity to correct the record. If this provision is not complied with, no such incident will be considered in applying disciplinary action nor will it be used against an employee in grievance or arbitration procedure.

28. ARBITRATION BOARD—POWERS

(a) Within ten (10) days after written notice is given by either party requesting arbitration as provided in Paragraph 27, the matter shall be referred to a tem-

porary Board of Arbitration consisting of one (1) member designated by the Company, one (1) member designated by the Union, and a third member to be selected by these two (2) members. In the event one of the parties refuses or fails to so designate its representatives, then the party in default shall forfeit its case. In the event the members of the Board of Arbitration fail to select a third member within three (3) days, the parties shall jointly request the American Arbitration Association or the Federal Mediation and Conciliation Service to appoint the third member, both parties to be bound by such appointment. In the event one of the parties refuses or fails to join in such request, then the party in default shall forfeit its case. The majority decision of the Board of Arbitration shall be final and binding on both parties hereto.

(b) The Board of Arbitration shall be governed wholly by the terms of this Agreement and shall have no power to add to or change its terms, nor shall the Board of Arbitration be authorized to pass on matters which are not properly grievances as defined herein.

* * * *

31. CESSATION OF WORK—DISCHARGE IF GRIEVANCE PROCEDURE NOT FOLLOWED

Cessation of work or refusal to work by any employee on account of any grievance or alleged grievance of any employee, if the grievance procedure above set forth has not been fully complied with by the employee or employees or their representatives, shall constitute grounds for discharge or suspension of such employee. Nothing in this paragraph shall abridge the rights of any employee as set forth in Paragraph 45 relating to Safety.

* * * *

45. SAFETY

(a) The safety of the employees is a matter of paramount importance, shall receive first consideration, and

no employee shall be allowed or required to take any undue risk in the performance of his duties which he or his Foreman or Supervisor consider unsafe to himself or to his fellow workers. Supervisors and Foreman will be held strictly responsible for the enforcement of safe working rules. In case any Supervisor or Foreman is charged by an employee, or any employee is charged by the Company as being at fault in connection with any accident and such charge is deemed unfair, this action may be taken up as a grievance as provided in Article IV.

(b) The Company and the Union agree to establish a Joint Safety Committee of six (6) members, which shall be the same personnel that composes the Joint Apprenticeship Committee, plus one (1) additional Committeeman to be selected by the Union from the other Department than that from which the President of the System Council comes, and one (1) additional Committeeman selected by the Company. The Joint Safety Committee shall be responsible for developing and recommending an effective safety program for all employees covered by this Agreement, including changes or additions to present safety rules, conducting investigations of accidents when deemed necessary. It is neither the intention of the Company nor the Union to use this program for the purpose of creating work rules governing hours of work and conditions of employment.

This Committee will not involve itself in disciplinary action.

It is agreed that the Local Joint Advisory Safety Committees will continue to function in an advisory capacity to the Joint Safety Committee, as outlined in the "Standards and Procedures for the Administration of the Joint Advisory Safety Program".

It is further agreed that in those cases involving materials, safety tools, devices and equipment, it will be the

function of the Joint Safety Committee to recommend changes, deletions and additions, as prescribed by the "Standards and Procedures of the Joint Safety Program".

Either party has the privilege of terminating this program on thirty (30) days' notice.

* * * *

48. APPRENTICES IN ALL DEPARTMENTS

(a) In each regular and Itinerant Line Crew, the ratio of Apprentices to Journeymen Linemen shall not exceed: one (1) Apprentice to two (2) Journeymen Linemen; two (2) Apprentices to three (3) Journeymen Linemen; two (2) Apprentices to four (4) Journeymen Linemen; and three (3) Apprentices to five (5) Journeymen Linemen. When working on new construction not on poles with or crossing energized circuits, the ratio shall not exceed one (1) Apprentice to one (1) Journeyman Lineman. For the purpose of this clause, Working Foremen and Itinerant Working Foremen shall be considered Journeymen Linemen.

(b) In the Service or Cut-in Crews (two-man crews) the ratio of Apprentices to Journeymen shall not exceed one (1) Apprentice to one (1) Journeyman. A Serviceman "A" is a Journeyman.

(c) In the Electrician classification in all departments, the Mechanic and Instrument Mechanic classifications in the Production Department, the Cable Splicer classification in the Transmission-Distribution Department, and all corresponding Itinerant classifications, the ratio of Apprentices to Journeymen at any one (1) location shall not exceed: One (1) Apprentice to one (1) Journeyman; one (1) Apprentice to two (2) Journeymen; two (2) Apprentices to three (3) Journeymen; two (2) Apprentices to four (4) Journeymen; three (3) Apprentices to five (5) Journeymen; three (3) Apprentices to six (6) Journeymen; and above six (6) Journeymen, the ratio will

be 1 to 2. For the purpose of this clause, Chief Electricians, Machinists, Working Foremen, Itinerant Working Foremen, and Network Maintenance Men shall be considered Journeymen. Maintenance Foremen whose regularly assigned crew does not consist of more than two (2) Journeymen will be considered as Journeymen for the purpose of this clause.

(d) In the Repairman A (Transformer Shop), and Meterman A classifications, the ratio of Apprentices to Journeymen at any one (1) location shall not exceed 1 to 1.

(e) Ratios as set out in (a), (b), (c) and (d) above shall be determined on the basis of the number of Apprentices and corresponding Journeymen on the payroll at a working headquarters. The temporary absence of Journeymen from a headquarters shall not be considered as affecting the ratio in that headquarters or crew.

(f) In all departments when an Apprentice has been in the Apprentice classification for more than two (2) years and is not competent to become a Journeyman, he shall not be counted in the Apprentice ratio.

(g) It is agreed that there will be a Joint Apprenticeship Committee composed of equal representation from the Company and the Union. Such Committee will plan and carry on the Joint Apprentice Training Program. Either party has the privilege of terminating the program on thirty (30) days' notice. It is agreed that this Agreement will be amended to include mutually agreed Lines of Progression. If the Apprentice Training Program is terminated by either party, the Lines of Progression will be automatically terminated.

(h) When an employee has served four (4) full years in the Apprentice classification, he shall automatically be promoted to a Journeyman classification at his location, provided that he is fully qualified. Job Posting Procedure will not apply in the automatic promotion of Apprentices.

* * * *

PARAGRAPH 7(c)

Under this paragraph, an employee may be assigned to work in a lower classification to do work which he is able to perform. He may be assigned to work in an equal classification to do work which he is able to perform under the terms of the Memorandum of Understanding on Sideways Relieving, dated February 21, 1957. He may be assigned to an extra job, at his regular rate of pay, which may involve some work of a higher classification if he is not able or required to perform all of the work of such higher classification due to lack of knowledge or physical limitations.

For the Union	For the Company
/s/ A. A. Moore	/s/ G. V. Crawford

* * * *

MISCELLANEOUS

The Manner an Electrical Apprentice Will Work

It is recognized that an Electrical Apprentice is in training under Journeymen to become a qualified Journeyman. It is also recognized that as he progresses in his apprenticeship, he becomes qualified to perform productive work, and will be expected to perform all the duties of a Journeyman which he has become qualified to do. It is not the intention of the Company to use an Apprentice on any type of work which the Apprentice has not become qualified to perform through experience and training. In this regard, the Company will not require an Apprentice to work on, climb through or work above energized conductors carrying more than 500 volts during his first year of apprenticeship.

After completing his first year, the determination of whether the Apprentice is qualified to work on conductors carrying more than 500 volts will be made by the

Apprentice himself, the Foreman supervising the Apprentice, and the Journeyman with whom he works. Should any question arise as to whether or not he is qualified to perform the duties assigned to him, which cannot be resolved locally it shall be brought to the attention of the Supervisor of Apprentice Training, who will investigate the qualifications of the Apprentice and report his findings to the Joint Apprenticeship Committee for determination as to whether the Apprentice is qualified to perform the work in question.

For the Union	For the Company
/s/ A. A. Moore	/s/ Robert W. Wall, Jr.

MISCELLANEOUS

The Manner an Electrical Apprentice Will Work

It has come to the attention of the Apprentice Committee that the "Memorandum of Understanding as to the Manner an Electrical Apprentice Will Work" is being interpreted in some locations that after an Apprentice has the required first year of apprenticeship, he can be required to work on conductors carrying more than 500 volts. The Memorandum clearly provides that the determination of whether an Apprentice is qualified to work on conductors carrying more than 500 volts will be made by the Apprentice himself, the Foreman supervising the Apprentice, and the Journeyman with whom he works. Even if the Apprentice has more than the first year as an Apprentice, the above determination must be made. In arriving at the first year of apprenticeship, the time in classification plus credit allowed for related experience is to be used.

For the Union	For the Company
/s/ A. A. Moore	/s/ Robert W. Wall, Jr.

* * * *

Supreme Court, U.S.
FILED
AUG 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, AND LOCAL 759 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, SYSTEM COUNCIL U-4,
Petitioners,

v.

SALLY HECHLER,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF FOR PETITIONERS

LAURENCE J. COHEN
(Counsel of Record)
ELIHU I. LEIFER
RICHARD M. RESNICK
1125 15th St., N.W.
Washington, D.C. 20005
(202) 785-9300

Of Counsel:
LAURENCE GOLD
DAVID M. SILBERMAN
815 16th St., N.W.
Washington, D.C. 20006

ALLAN M. ELSTER
Point East Professional Bldg.
17971 Biscayne Blvd.
North Miami Beach, Florida 33160
Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

35pp

QUESTIONS PRESENTED

A. Does § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, under the Supreme Court's decision in *Allis-Chalmers Corp. v. Lueck*, —— U.S. ——, 53 L.W. 4463 (April 16, 1985), preempt a state tort law from defining the legal consequences of entering into a duty by virtue of a collective bargaining agreement?

B. Does the federal duty of fair representation preempt state law from imposing additional duties on an exclusive bargaining representative with respect to the manner in which a union performs its functions as bargaining representative?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT	6
Introduction and Summary	6
I. RESPONDENT'S STATE LAW CLAIM IS PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947	11
II. UNDER THE GOVERNING FEDERAL LAW, THE DISTRICT COURT PROPERLY DISMISSED RESPONDENT'S COMPLAINT	21
CONCLUSION	28

TABLE OF AUTHORITIES

CASES: Page

Allis-Chalmers v. Lueck, —— U.S. ——, 53 L.W. 4463 (April 16, 1985) 9, 11-19, 21
Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968) 6, 18
Banfield v. Addington, 104 Fla. 661, 140 So. 893 (1932) 16
Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) 25
Bowen v. United States Postal Service, 459 U.S. 212 (1983) 25
Brooks v. New Jersey Manufacturers Ins. Co., 170 N.J. Super. 20, 405 A.2d 466 1979) 7, 8
Bryant v. Mine Workers, 467 F.2d 1 (6th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973) 7
Burgess v. Allendale Mut. Ins. Co., 111 LRRM 2997 (S.D. Ga. 1982) 7
Carbon Fuel Co. v. Mine Workers, 444 U.S. 212 (1979) 19, 20
Carollo v. Forty-Eight Insulation, Inc., 252 Pa. Super. 422, 381 A.2d 990 (1977) 7, 8
Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972) 16
Condon v. Steelworkers Local 2944, 683 F.2d 590 (1st Cir. 1982) 7
DelCostello v. Teamsters, 462 U.S. 151 (1983) 10, 24, 25, 27, 28
Dunbar v. Steelworkers, 602 P.2d 21 (Idaho 1979), *cert. denied*, 446 U.S. 983 (1980) 7
Electrical Workers v. Foust, 442 U.S. 42 (1978) 24, 25, 26
Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) 25
Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983) 6, 12
Gerace v. Johns-Manville Corp., 95 LRRM 3282 (Pa. Ct. C.P. 1977) 7, 8
Globig v. Johns-Manville Corp., 486 F.Supp. 735 (E.D. Wis. 1980) 7
Hartsfield v. Seafarers Int'l. Union, 427 F.Supp. 264 (S.D. Ala. 1977) 7

TABLE OF AUTHORITIES—Continued

	Page
Helton v. Hake, 564 S.W.2d 313 (Mo. App. 1978), *cert. denied*, 439 U.S. 959	7
Higley v. Disston, 92 LRRM 2443 (Wash. Super. 1976)	7, 8
Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976)	24
Holbrook v. Sarasota, 58 So.2d 862 (1952)	16
House v. Mine Safety Appliances Co., 417 F.Supp. 939 (D. Idaho 1976)	7
Howard v. Lyons, 360 U.S. 593 (1959)	27
Mahoney v. Chicago Pneumatic Tool Co., 111 LRRM 2839 (W.D. Mich. 1982)	7
McColgan v. Mine Workers, 124 Ill. App. 3d 825, 464 N.E.2d 1166 (1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 1752 (1985)	7, 8
McGill v. Cockerill, 88 Fla. 54, 101 So. 199 (1924)	20
Merrell Dow Pharmaceuticals Inc. v. Thompson, —— U.S. ——, 54 L.W. 5088 (July 7, 1986)	6
Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983)	20
Michigan Mutual Insurance Co. v. Steelworkers, 774 F.2d 104 (6th Cir. 1985)	7
Parrish v. Clark, 107 Fla. 598, 145 So. 848 (1933)	16
Pockalny v. Elwell Parker Elec. Co., 608 F.Supp. 570 (W.D.N.Y. 1985)	7
Presiler v. Steelworkers, No. N-83-159 (D. Conn., Feb. 24, 1984)	7
Safeco Title Ins. Co. v. Reynolds, 452 So.2d 45 (Fla. App. 1984)	16
Sharp v. Williams, 141 Fla. 1, 192 So. 476 (1939)	20
Smith v. Kansas City Title & Trust Co., 225 U.S. 180 (1921)	6
Steele v. L.N.R. Co., 323 U.S. 192 (1944)	24
Teamsters Local v. Lucas Flour Co., 369 U.S. 95 (1962)	11, 12, 18, 19, 20
Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957)	11

TABLE OF AUTHORITIES—Continued

Page

Vaca v. Sipes, 386 U.S. 171 (1967) 10, 24, 26, 27
Vorndran v. Wright, 367 So.2d 1071 (Fla. App. 1979) 15
Wilson v. United Mine Workers, Civ. No. 78-G-1362-S (N.D. Ala. 1980) 7

STATUTES:

Labor Management Relations Act of 1947
§ 301, 29 U.S.C. § 185 ..... *passim*
National Labor Relations Act, as amended
§ 9, 29 U.S.C. § 159 25
§ 10(b), 29 U.S.C. § 160(b) 11, 28

MISCELLANEOUS:

Florida Jur. 2d (1977) 15, 16
Prosser & Keaton on the Law of Torts (5th Ed. 1984) 7, 8, 15, 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1360

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, AND LOCAL 759 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, SYSTEM COUNCIL U-4,

Petitioners,

v.

SALLY HECHLER,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 722 F.2d 788 and is reprinted as Appendix B to the petition for the writ of certiorari. The opinion of the United States District Court for the Southern District of Florida is unreported and is reprinted as Appendix A to the petition.

JURISDICTION

The opinion and judgment of the Court of Appeals were issued on September 30, 1985. A timely petition for rehearing was denied on November 14, 1985. A timely petition for a writ of certiorari was filed on February

12, 1986. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, provides in pertinent part as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

At all times relevant herein, respondent Sally Hechler was employed by Florida Power and Light Company ("Florida Power" or "the Company") as an electrical apprentice. Petitioners International Brotherhood of Electrical Workers and its Local 759 (collectively referred to as "the Union") are the exclusive bargaining representatives for the bargaining unit in which respondent was employed.

Some time prior to January 11, 1982, respondent was assigned by Florida Power to work at an electrical substation. Under the terms of the collective bargaining agreement between the Company and the Union, the Company had the sole authority, pursuant to the management rights provision of the agreement, to "assign and reassign" employees. J.A. 9. Under that contract the Union had no role in making assignments.

On January 11, 1982, respondent was injured in the course of her employment when she came into contact with highly energized components at the electrical substation to which she had been assigned by the Company.

Two years later, respondent commenced this action against the Union for damages arising out of the occupational injury she had suffered.

Respondent's complaint alleged that "pursuant to contracts" between the Union and the Company, "to which contracts . . . the [respondent] was a third-party beneficiary," the Union "owed the [respondent] the duty to assure that the [respondent] was provided safety in the work place . . . and further, the [respondent] would not be required or allowed to take undue risks in the performance of her duties . . . or to work in an area which was not safe as commensurate with her training and experience." J.A. 4. The complaint further alleged that the union "breached [this alleged contractual] duty and w[as] consequently negligent" by, *inter alia*, "allowing [respondent] to be assigned to work in and allowing her to actually work in" an electrical substation and by "failing to provide her with or ascertaining that she had the necessary training, experience, background and education to work in such a dangerous environment." J.A. 4-5.[1] The complaint sought damages from the Union.

---

[1] Respondent's statement of the manner in which the Union allegedly breached its contractual duty is as follows:

> 6. Your Plaintiff, SALLY HECHLER, did not have the necessary nor required training, background, education or experience to work in such an inherently dangerous work place as an electrical substation, but, despite this, the Defendants, and each of them, breached their duty and were consequently negligent to your Plaintiff, SALLY HECHLER, by allowing her to be assigned to work in and allowing her to actually work in such a dangerous location and environment and by failing to provide her with or ascertaining that she had the necessary training, experience, background and education to work in such a dangerous environment, or ascertaining prior to her employer, Florida Power, placing her in such a dangerous environment, that she received the necessary education, background, training and experience. Further, the Defendants were further negligent when they did not take any actions to protect your Plaintiff, SALLY HECHLER, from the

Relying on the fact that "[t]he complaint alleges that the defendants breached a duty . . . aris[ing] solely from the alleged collective bargaining agreement between defendants and Florida Power," R. 3, the Union removed respondent's action from state court, where respondent had filed her suit, to federal court; respondent did not object to the removal at the time it was effected. The Union thereafter moved to dismiss the complaint on the ground that respondent's claim necessarily arose under federal law and was untimely under the applicable federal limitations period. Respondent resisted this motion on the ground that she had stated a valid state-law claim, and respondent, for the first time, sought to have the case remanded to state court.

In ruling on the motion to dismiss and the cross-motion to remand, the district court began by noting that "[s]ignificantly, the duty allegedly owed to plaintiff flows from the collective bargaining agreement." Pet. App. 3a. The district court cited in particular to several provisions of the agreement, which that court appended to its opinion. The first of those provisions, entitled "SAFETY," provides that

> The safety of the employees is a matter of paramount importance, shall receive first consideration, and no employee shall be allowed or required to take any undue risk in the performance of his duties which he or his Foreman or Supervisor consider unsafe to himself or to his fellow workers. Supervisors and foremen will be held strictly responsible for the enforcement of safe working rules. [J.A. 13-14].

---

risks inherent in such an inherently dangerous environment by providing and/or enforcing safety rules, regulations and requirements which would preclude such persons with inadequate and insufficient background, training, education and experience, such as the Plaintiff, SALLY HECHLER, from being placed in such an inherently dangerous working environment, such as an electrical substation. [J.A. 4-5]

This provision goes on to establish a labor-management "Joint Safety Committee" which is "responsible for developing and recommending an effective safety program . . . including changes or additions to present safety rules"; the agreement in terms also limits the committee by providing that it has no authority to "involve itself in disciplinary action" nor to develop "work rules governing . . . conditions of employment." *Id.* at 14.

The second provision to which the district court cited is a side-agreement entitled "The Manner An Electrical Apprentice Will Work" which states:

> It is recognized that an Electrical Apprentice is in training under Journeymen to become a qualified Journeyman. It is also recognized that as he progresses in his apprenticeship, he becomes qualified to perform productive work, and will be expected to perform all the duties of a Journeyman which he has become qualified to do. It is not the intention of the Company to use an Apprentice on any type of work which the Apprentice has not become qualified to perform through experience and training. In this regard, the Company will not require an Apprentice to work on, climb through or above energized conductors carrying more than 500 volts during his first year of apprenticeship. [*Id.* at 17.]

The district court concluded that because "the duty allegedly owed to plaintiff flows from [these provisions of] the collective bargaining agreement," respondent's suit is necessarily "based on federal . . . law" and was untimely filed under the applicable federal limitations period. Pet. App. 2a-3a. The district court explained that to plead a state-law claim, respondent would have to allege "negligent [union] activity [which] was unrelated to the collective bargaining agreement or beyond the scope of the employee-union fiduciary relationship"; the district court concluded that respondent "has not satisfied this pleading requirement." Pet. App. 4a.

On appeal, the Eleventh Circuit reversed. That court concluded that although "a remedy may have been avail-

able to" respondent under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, and although respondent's "state action may in part involve the same relief available under § 301," Pet. App. 18a-19a, nonetheless respondent's "complaint on its face states a common law negligence claim that may be cognizable in state court and is not preempted by the federal labor laws." Pet. App. 14a. The court of appeals directed the district court "to remand the case to the state court." *Id.*[2]

On May 19, 1986, this Court issued a writ of certiorari to review the Eleventh Circuit's decision.

ARGUMENT

Introduction and Summary

Reduced to its essentials, respondent's complaint in this case is that she was assigned by her employer to a work

---

[2] Although the court of appeals' ultimate conclusion was that the federal courts lacked jurisdiction over respondent's claim, that court properly understood that under *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968), federal jurisdiction would exist if as the Union contends, respondent's claim were preempted by, and fell within § 301. Thus the appellate court properly addressed the merits of that preemption issue.

The court below erred, however, in holding that its determination that respondent's claim was not preempted established a lack of federal jurisdiction and necessitated a remand. For in all events it is clear that "a necessary element" of respondent's claim for negligent performance of obligations under a collective bargaining agreement is a "substantial . . . question of federal law," *viz.*, the meaning of that agreement. *Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1, 13 (1983). And even if, *arguendo*, the Court were to conclude that the federal elements implicated by respondent's claim did not preclude the application of state law, at the very least those elements are sufficient to support federal jurisdiction under the rule of *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). *See also Merrell Dow Pharmaceutical's Inc. v. Thompson*, —— U.S. ——, 54 L.W. 5088 (July 7, 1986).

Thus, regardless of how the preemption question before this Court is resolved it is clear that this case was properly removed to federal court and should not be remanded.

station that was too dangerous for her, given her level of experience and training. The Union did not make that job assignment, nor did the Union have any say over the assignment. Nevertheless, respondent attempts to hold the Union liable for the injuries she suffered in the course of her employment.

Until a few years ago, such an attempt would have been entirely unheard of. In recent years, however, as injured workers (and their counsel) have sought to supplement the awards obtained from employers through state workers compensation laws, efforts have been made with increasing frequency to find "third parties" on whom to impose liability. In organized workplaces, labor unions have proved to be inviting targets for suits of this type.[3]

The problem faced by would-be plaintiffs in mounting such suits is that under the common law it is the *employer* who owes his employees a duty to provide a safe workplace. *Prosser & Keaton on Torts* 569 (5th ed.

---

[3] *See, e.g., Michigan Mutual Ins. Co. v. Steelworkers*, 774 F.2d 104 (6th Cir. 1985); *Condon v. Steelworkers Local 2944*, 683 F.2d 590 (1st Cir. 1982); *Bryant v. Mine Workers*, 467 F.2d 1 (6th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973); *Pockalny v. Elwell Parker Elec. Co.*, 608 F. Supp. 570 (W.D.N.Y. 1985); *Presiler v. Steelworkers*, No. N-83-159 (D. Conn., Feb. 24, 1984); *Burgess v. Allendale Mut. Ins. Co.*, 111 LRRM 2997 (S.D. Ga. 1982); *Mahoney v. Chicago Pneumatic Tool Co.*, 111 LRRM 2839 (W.D. Mich. 1982); *Wilson v. United Mine Workers*, Civ. No. 78-G-1362-S (N.D. Ala., June 3, 1980); *Globig v. Johns-Manville Corp.*, 486 F. Supp. 735 (E.D. Wis. 1980); *Hartsfield v. Seafarers Int'l. Union*, 427 F. Supp. 264 (S.D. Ala. 1977); *House v. Mine Safety Applicance Co.*, 417 F. Supp. 939 (D. Idaho 1976); *Brooks v. New Jersey Manufacturers Ins. Co.*, 170 N.J. Super. 20, 405 A.2d 466 (1979); *Helton v. Hake*, 564 S.W.2d 313 (Mo. App. 1978), *cert. denied*, 439 U.S. 959; *Dunbar v. Steelworkers*, 602 P.2d 21 (Idaho 1979), *cert. denied*, 446 U.S. 983 (1980); *Carollo v. Forty-Eight Insulation, Inc.*, 252 Pa. Super. 422, 381 A.2d 990 (1977); *Gerace v. Johns-Manville Corp.*, 95 LRRM 3282 (Pa. Ct. C.P. 1977); *Higley v. Disston*, 92 LRRM 2443 (Wash. Super. 1976); *McColgan v. Mine Workers*, 124 Ill. App. 3d 825, 464 N.E.2d 1166 (1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 1752 (1985).

1984). No third party owes such an independent duty as a matter of law, nor is any third party under an independent legal duty to police the performance of an employer in meeting his responsibility. That being so, plaintiffs have turned to provisions of collective bargaining agreements that afford unions a role in monitoring an employer's safety-related performance, and have argued that by conferring certain rights or privileges on unions, these provisions give rise to legal duties under state law which duties provide a basis for holding unions liable for occupational injuries.

Until the decision below in the instant case, every federal court and a number of state courts[4] considering a suit of this type had rejected the attempt to use state negligence law to hold a union liable for an injury an employee suffered in the course of his employment. These courts have reasoned, in essence, that *federal law*, and not state law, governs a union's liability for the manner in which the union enforces (or fails to enforce) its collective bargaining agreements or for the union's performance as exclusive representative. The court below reached the contrary conclusion.

As we proceed to show, in so doing, the court of appeals erred. Our argument proceeds as follows.

In Part I we show that respondent's claim is preempted by, and constitutes a claim under, § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. Under this Court's decisions, the test of whether a state-law claim is preempted by § 301 is whether that claim is "substantially dependent upon an analysis of the terms of a [collective bargaining] agreement," or whether, instead, the claim asserts "rights . . . independent of any

---

[4] *See, Brooks v. New Jersey Manufacturers Inc., supra* n.3; *Carollo v. Forty-Eight Insulating, Inc., supra* n.3; *Gerace v. Johns-Manville Corp., supra* n.3; *Higley v. Disston, supra* n.3; *McColgan v. Mineworkers, supra* n.3.

right established by contract." *Allis-Chalmers Corp. v. Lueck*, —— U.S. ——, 53 L.W. 4463, 4467-68 (April 16, 1985). Measured against that test, respondent's claim clearly falls within the ambit of § 301.

Under Florida law, unions do not have any independent legal obligation to assure that employers make only safe job assignments. The gravamen of respondent's complaint, therefore, is that "*pursuant to contracts and agreements*" with Florida Power the Union assumed such a duty. P. 3, *supra*. As respondent concedes, "the contract in question admittedly defines the nature and scope of the Unions' duties." Resp. Br. in Op. at 8-9. Thus here, as in *Lueck*, "questions of contract interpretation . . . underlie any finding of tort liability." 53 L.W. at 4467. For that reason, respondent's claim is preempted by § 301.

Even if respondent's claim were not so clearly based upon the collective bargaining agreement—even if, for example, Florida law purported to impose upon unions who are party to collective bargaining agreements the legal obligation to police job assignments regardless of what the Union agrees to by contract—a complaint alleging a breach of such a duty still would be preempted by § 301. *Lueck* teaches that "the policies that animate § 301 . . . require that the relationships created by [a collective bargaining] agreement be decided by application of an evolving federal common law grounded in national labor policy." 53 L.W. at 4465. In concrete terms, this means that federal law must decide what legal duties, if any, are to be superimposed on (*viz.*, implied in law from) a collective bargaining agreement. And that is why *Lueck* holds that suits alleging violations of state-law rights are preempted by § 301 if those rights "do not exist independently of private agreement." 53 L.W. at 4465.

Because respondent's claim falls under § 301, it necessarily follows that this Court must either remand the

instant case to the court of appeals to allow that court to decide, applying federal law principles, whether the case was properly dismissed by the district court, or alternatively, this Court must decide that question. In Part II, we show that a remand is not necessary and would entail a needless expenditure of judicial resources because the particular § 301 claim respondent has pled is governed by the law of fair representation and is untimely under that law.

At bottom, as we noted at the outset, respondent's complaint is that she was assigned by Florida Power to a workplace in which it was too dangerous for her to work, given her background, training, and experience. The most that the Union could have done with respect to that assignment was grieve it under the grievance-arbitration procedures of the collective bargaining agreement. Respondent's claim, then, necessarily is, as she stated to the district court, that she was injured as a *direct result of the [union's] failure to enforce provisions contained in the collective bargaining agreement.*" R. 100-01, emphasis added.

The duty of fair representation is the source of law that governs such a claim. This Court has taken great pains to shape fair-representation law in a manner that balances competing interests and furthers the national labor policy. The balance could be easily upset if the courts were free to apply inconsistent rules of law, either in the name of creating a federal common law of implied contractual obligations or in the name of enforcing state negligence law. For that reason, *Vaca v. Sipes*, 386 U.S. 171 (1967), squarely holds that the federal duty of fair representation is the sole source of law for the courts to apply in judging a union's conduct in performing its functions as exclusive representative, including its functions in enforcing collective bargaining agreements.

Applying the fair-representation doctrine, the district court properly dismissed respondent's complaint. Under *DelCostello v. Teamsters*, 462 U.S. 151 (1983), the appli-

cable statute of limitations for fair representation claims is the six-month period contained in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). Respondent's complaint, which was filed more than two years after respondent was injured, thus is untimely under § 10(b).

I. RESPONDENT'S STATE LAW CLAIM IS PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947

A. By its terms, § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, creates federal jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees . . ." In the seminal case of *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 445, 446 (1957), this Court concluded that § 301 "expresses a federal policy that federal courts should enforce these agreements," and that "the substantive law to apply is federal law, which the courts must fashion from the policy of our national labor laws." *Lincoln Mills* thus "understood § 301 as a congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts." *Allis-Chalmers Corp. v. Lueck*, —— U.S. ——, 53 L.W. 4463, 4465 (April 16, 1985).

In *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 107 (1962), the Court expanded on the rule of *Lincoln Mills* by holding that "[t]he dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute [so that] issues raised in suits of a kind covered by § 301 [are] decided according to the precepts of federal labor policy." The Court explained:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon

> both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation . . . [*Id.* at 103-104.]

Lucas Flour thus teaches that "in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Id.* at 104.

In subsequent cases, the Court, in elaborating on the holding of *Lucas Flour*, has made it clear that the "preemptive force of § 301 is so powerful as to displace entirely any state cause of action . . ." *Franchise Tax Board v. Laborers Vacation Trust, supra*, 463 U.S. at 23. "[A]ny complaint that comes within the scope of the federal cause of action"—even though "pleaded [as] an adequate claim for relief under . . . state law" and seeking "a remedy available *only* under state law"—nonetheless is "purely a creature of federal law" and is to be treated as a § 301 claim. *Id.* at 23-24. The question in this case, then, is whether the claim alleged in respondent's complaint falls within "the scope of the federal cause of action."

B. Until this Court's decision in *Lueck*, the Court had not had occasion to define "the area covered" by § 301, *Lucas Flour, supra*, 369 U.S. at 103, or "the scope of the federal cause of action," *Franchise Tax Board, supra*, 463 U.S. at 24, because all prior § 301 cases had involved nothing more than suits to "enforc[e] the contract," *Lucas Flour, supra*, 369 U.S. at 104. In *Lueck*, however, the Court was required to decide "whether § 301 . . . preempts a

state law tort action for bad-faith delay in making disability-benefit payments due under a collective-bargaining agreement." 53 L.W. at 4464. In resolving that issue, the *Lueck* Court offered substantial guidance as to the reach of § 301; *Lueck* thus merits detailed review here.

Lueck arose out of a collective bargaining agreement which obligated the employer to provide disability benefits to bargaining-unit employees. The plaintiff, an (allegedly) disabled employee who had submitted a claim for benefits under the agreement, brought a tort suit against the employer in the Wisconsin state courts. The theory of the complaint was that because the employer in the collective bargaining agreement had undertaken to provide disability benefits to his employees, Wisconsin law imposed on the employer, in common with benefit-provides generally, a duty to exercise good faith in processing claims for benefits. The complaint alleged that the employer had breached this duty by periodically, without justification, withholding benefits from the plaintiff for varying periods of time. This Court held that the trial court had properly dismissed that complaint because "Congress intended § 301 to pre-empt this kind of derivative tort claim." 53 L.W. at 4467.

The Court began by noting that "a suit in state court alleging a violation of a provision of a labor contract must be brought under § 301 and be resolved by reference to federal law." *Id.* at 4465. The Court went on to observe that "[i]f the policies that animate § 301 are to be given their proper range . . . the pre-emptive effect of § 301 must extend beyond suits alleging contract violations" because those § 301 policies "require that 'the relationships created by [a collective bargaining] agreement' be defined by application of 'an evolving federal common law grounded in national labor policy.'" *Id.* Thus the Court concluded that *any* suit in which "the relationships created by a collective bargaining agreement" are at issue must be resolved by federal law

> *whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort.* Any other result would elevate form over substance and allow parties to evade the requirement of § 301 by re-labeling their contract claims as claims for tortious breach of contract. [*Id.*, emphasis added.]

Based on this analysis, the Court in *Lueck* took the following approach to the particular claim presented there:

> Our analysis must focus . . . on whether the Wisconsin tort action for breach of the duty of good faith as applied here confers non-negotiable state law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract. If the state tort law purports to define the meaning of the contract relationship, that law is pre-empted. [*Id.* at 4466.]

And the Court stated its holding as follows:

> We . . . hold that when resolution of a state law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim or dismissed as pre-empted by federal labor-contract law. [*Id.* at 4468.]

Applying that rule to the claim in *Lueck*, the Court concluded that because "[q]uestions of good faith performance . . . necessarily are related to the application of terms of the contractual agreement," *id.* at 4467 n.11, "the tort is not sufficiently independent of questions of contract interpretation to avoid the pre-emptive effect of § 301," *id.* at 4467 n.13. The Court explained:

> [A]ny attempt to assess liability here inevitably will involve contract interpretation. The parties' agreement as to the manner in which a benefit claim would be handled will necessarily be relevant to any allega-

> tion that the claim was handled in a dilatory manner. Similarly, the question whether Allis-Chalmers required Lueck to be examined by an inordinate number of physicians depends in part upon the parties' understanding concerning the medical evidence required to support a benefit claim. These questions of contract interpretation, therefore, underlie any finding of tort liability . . . Congress has mandated that federal law govern the meaning given contract terms. Since the state tort purports to give life to these terms in a different environment, it is preempted. [*Id.* at 4467.]

C. The instant case falls squarely within the *Lueck* rule and respondent's state law tort claim is thus preempted by § 301. To understand why that is so requires a review of respondent's claim and the body of state law respondent seeks to invoke.

Under Florida law, as under the common law generally, *see* p. 8, *supra*, "[a]n employer owes his employees the duty to furnish a reasonably safe place in which to work, and must use ordinary care and diligence to keep it safe." 2 Florida Jur. 2d, *Agency and Employment*, § 154 & cases cited nn.44-45 (1977). Encompassed within that duty is the obligation to "consider the age, mentality and lack of experience and capacity of [the employer's] employees and fully instruct them as to the dangers incident to the particular employment for which they are engaged." *Id.* § 148 & cases cited n.18. This duty to provide a safe workplace is non-delegable, as under Forida law "[o]ne on whom the law devolves a duty cannot shift it to another." 8 Fla. Jur. 2d, *Negligence*, § 11 and cases citd nn. 56-57 (1982). And no other party has an independent obligation to police the employer's performance of his legal duty. *Cf., e.g., Vorndran v. Wright*, 367 So.2d 1071 (Fla. App. 1979).

At the same time, under Florida law—as under the common law generally, *see Prosser & Keeton, supra*, at 656-57—the general rule is that "for an injury occasioned by want of due care and skill in doing what

one has promised to do, an action may be maintained." *Banfield v. Addington*, 104 Fla. 661, 140 So. 893, 896 (1932). That "action may [be] for the breach of the contract"—as the duty to exercise due care is implied as part of the contractual obligation—"or for the positive tort committed by the violation of a duty arising out of the assumption of the contractual relationship." *Parrish v. Clark*, 107 Fla. 598, 145 So. 848, 850 (1933). It is thus a "long-established principle [in Florida] that injuries caused by the allegedly negligent performance of a contractual duty may be redressed through a tort action." *Safeco Title Ins. Co. v. Reynolds*, 452 So.2d 45 (Fla. App. 1984).[5]

It is this latter rule which respondent here seeks to invoke. As previously noted, respondent's complaint alleges that "*pursuant to contracts and agreements* entered into by and between the [Union] and the said Florida Power to which contracts and agreements the [respondent] was a third-party beneficiary, the [Union] owed the [respondent] the duty to assure that the [respondent] was provided safety in her workplace." P. 3, *supra*. Thus, as respondent acknowledged in her brief in opposition to the petition for a writ of certiorari, her "claim is that the Unions were negligent *in the performance of a contractual obligation*." Resp. Br. in Opp. at 4 (emphasis added). And in making this claim, respondent concedes that "the contract in question admittedly defines the nature and scope of the Union's duties." *Id.* at 8-9. Because that is so, it necessarily follows, for two independent reasons, that respondent's claim falls within the "area covered by" § 301 as that area is delimited in *Lueck*.

---

[5] *See also, e.g., Holbrook v. Sarasota*, 58 So. 2d 862, 864 (Fla. 1952) (a suit for negligence by hospital personnel properly brought as a contract suit "[e]ven though it may have been proper . . . to have brought a tort action"); *Colhoun v. Greyhound Lines, Inc.*, 265 So. 2d 18, 21 (Fla. 1972) (same with respect to negligence of a common carrier"); *Safeco Title Ins. Co. v. Reynolds*, 452 So. 2d 45 (Fla. App. 1984); 38 Fla. Jur. 2d, *Negligence* § 17 (1977).

1. In the instant case, as in *Lueck*, "any attempt to assess liability . . . inevitably will involve contract interpretation." 53 L.W. at 4467. Inasmuch as unions do not have any independent legal obligation to assure that employers make safe job assignments, the allegations in the complaint that the Union "fail[ed] to provide [respondent] with or ascertain[] that she had the necessary training, experience, background and education to work in such a dangerous environment . . . prior to her employer, Florida Power, placing her in such a dangerous environment," and that the Union "did not . . . provid[e] and or enforc[e] safety rules . . . which would preclude such persons with inadequate and insufficient background, training, education, and experience . . . from being placed in an inherently dangerous working environment," pp. 3-4 & n.1, *supra*, are not, in and of themselves, of any legal significance. Standing alone those allegations would carry no more weight than a claim that an innocent bystander did not intermeddle in the Company's affairs.

The allegations in respondent's complaint assume significance if—*but only if*—the Union had assumed a duty to act in the particular respects in which the complaint claims the Union failed to act; only in that event would the Union's alleged inaction be transformed into an actionable wrong. Respondent's complaint alleges that the Union did assume such a duty "*pursuant to contracts*" between the Union and Florida Power to which contracts respondent "was a thirty-party beneficiary." In particular, the theory of the complaint is that under the collective bargaining agreement the Union "owed the [respondent] the duty to assure that the [respondent] was provided safety in her workplace" and that this general obligation carried with it a more specific, contractual duty to police the Company's assignment of employees to dangerous locations.

It follows that in order to adjudicate respondent's negligence claim, it would be necessary to decide first whether

the collective bargaining agreement, in fact, places upon the Union "the duty to assure that the [respondent] was provided safety in her workplace," and, if so, second, to determine the nature and scope of that contractual duty, *viz.*, whether (and to what extent) the duty extends to matters of job assignments. Thus what the Court said in *Lueck* applies here with full force: "questions of contract interpretation . . . underlie any finding of tort liability." 53 L.W. at 4467.[6] And as *Lueck* explains, "[t]he interests in interpretive uniformity and predictability . . . require . . . uniform federal interpretation . . . whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort." *Id.* at 4466. It follows that respondent's claim falls squarely within the scope of § 301.[7]

---

[6] The court below thought that this case was different from *Lueck* because in that case "the tort was essentially a product of the contract itself—without the contract no tort claim could have existed." Pet. App. 21a. But as shown in text—and as respondent's own description of her claim as one for "negligen[ce] in the performance of a contractual obligation," Resp. Br. in Opp. at 4, makes clear—precisely the same is true here: "without the contract no tort claim could have existed."

[7] Perhaps the clearest proof that respondent's claim is, in reality, a § 301 claim is the fact that under Florida law plaintiff could have framed her claim as a contractual claim for breach of the duty of due care implied in the contract. *See* p. 16, *supra*. Had respondent chosen to do so, there would be no doubt that such a claim would be preempted by § 301; that much is settled by *Lucas Flour* and *Avco Corp. v. Aero Lodge No. 735*, *supra*.

That plaintiff chose to denominate her claim as one sounding in tort—even though the substance of the claim is identical to the putative contractual claim—cannot alter the conclusion. As the Court stated in *Lueck*, to allow the tort-contract dichotomy to define the reach of § 301 "would elevate form over substance and allow parties to evade the requirements of § 301 by re-labeling their contract claims as claims for tortious breach of contract." 53 L.W. at 4465.

2. There is a second and independent reason why respondent's claim falls within the ambit of § 301. Even if, contrary to what we have just shown, resolution of respondent's state-law claim did not turn on a determination as to the nature and scope of the duties provided for in the collective bargaining agreement—even if, for example, Florida law purported to impose upon *unions who are party to collective bargaining agreements* the legal obligation to police job assignments regardless of what the Union agrees to by contract—a complaint alleging a breach of such a duty still would be preempted by § 301. For *Lueck* teaches that suits alleging violations of state-law rights are preempted by § 301 if those rights "do not exist independently of private agreements." 53 L.W. at 4465.

The reason for this rule is made clear in *Lueck*. "[T]he policies that animate § 301 . . . require that '*the relationships created by* [*a collective bargaining*] *agreement*' be decided by application of 'an evolving federal common law grounded in national labor policy.'" 53 L.W. at 4465 (emphasis added). In concrete terms this means that federal law must decide what legal duties, if any, are to be superimposed on—or, to use the terminology of the law of contracts, to be implied in law from—a collective bargaining agreement, just as federal law resolves disputes as to what duties are expressly or impliedly agreed to in such a contract.[8] For, from the standpoint

[8] Not surprisingly, the question whether a particular duty is to be implied from a labor contract—either because the parties so intended or because the law so requires—arises commonly in actions to enforce such contracts and, in that context, is routinely answered by federal law. In *Lucas Flour*, for example, the ultimate issue for decision was whether, notwithstanding the absence of a no-strike clause in the collective bargaining agreement, the union had an implied duty not to strike over issues which were arbitrable. Similarly in *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212, 216 (1979), the question presented was whether a duty "to use all reasonable means to prevent and end [wildcat] strikes . . . is either (a) implied in law because the [collective bargaining]

of the contracting parties, duties implied in law, duties implied in fact, and duties expressly assumed have precisely the same effect: each defines what is required of the obligated party by *virtue of the contract* and thus defines the legal consequences to the parties of entering into the contractual relationship.

State rules implying duties from collective bargaining agreements—*viz.*, state rules that impose legal obligations on the parties to such contracts—thus constitute state regulation of "the relationship" created by the agreement no less than state rules that govern the interpretation of the words of the agreement. And if by operation of the state tort law of the various states, a particular collective bargaining agreement could yield differing legal duties under competing legal systems, the "disruptive influence upon both the negotiation and administration of collective agreements," *Lucas Flour*, *supra*, 369 U.S. at 103, that § 301 is intended to prevent would be felt with full force.[9]

---

agreement contains an arbitration provision or (b) in any event is to be implied from the promise of the agreement that the parties . . . 'will maintain the integrity of the contract' ". And in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 707-10 (1983), one of the issues posed was whether union officers had an "implicit" contractual duty to "take affirmative steps to end an unlawful work stoppage."

[9] Again, it is relevant to note that a suit to enforce an implied-in-law duty can equally be framed as one sounding in contract or one sounding in tort. As the Florida Supreme Court itself has recognized, "[a] contract includes not only the things written but also terms and matters which, though not actually expressed, are implied by law." *Sharp v. Williams*, 141 Fla. 1, 192 So. 476, 480 (1940). Furthermore, "what the law implies from the relation of the parties created by an express agreement is as much a part of the contract as that which is expressed," *McGill v. Cockrell*, 88 Fla. 54, 101 So. 199, 201 (1924); such implied duties "are as binding as the terms which are actually written or spoken," *Sharp v. Williams*, *supra*.

Where claims based on implied duties are framed as contractual claims, there is no doubt that they are covered by § 301. No differ-

It follows that respondent's claim falls within "the area covered" by § 301.

II. UNDER THE GOVERNING FEDERAL LAW, THE DISTRICT COURT PROPERLY DISMISSED RESPONDENT'S COMPLAINT

What we have just shown establishes that, as in *Lueck*, respondent's claim "must either be treated as a § 301 claim or dismissed as pre-empted by federal labor-contract law." 53 L.W. at 4468. The Eleventh Circuit thus erred in concluding that plaintiff's complaint "states a common law negligence claim that may be cognizable in state court and is not preempted by the federal labor laws." Pet. App. 14a. This case must therefore either be remanded to that court to decide, *applying federal law principles*, whether the case was properly dismissed by the district court or, alternatively, this Court must decide that issue.

There is, we believe, no reason for this Court to remand the case and thereby require yet an additional expenditure of judicial resources on this matter. As we proceed to show, respondent's particular § 301 claim rests on the manner in which the union performed its function, as respondent's bargaining representative, in enforcing the collective bargaining agreement. Because that is so, the federal law that applies here is the law of fair representation, under which law respondent's complaint is untimely.

---

ent result should obtain in tort suits in which it is alleged that a legal duty imposed on parties to a collective agreement has been breached. *See Lueck*, 53 L.W. at 4465; *see also Prosser & Keaton supra*, 655, 5 ("The distinction between tort and contract liability, as between parties to a contract, has become an increasingly difficult distinction to make"; in both contract and tort "obligations of conduct are imposed by reason of the relation in which the parties stand toward one another").

A. Analysis begins with respondent's complaint. Reduced to its essentials, what the complaint alleges is that respondent was assigned to a workplace in which it was too dangerous for her to work, given her background, training and experience. The complaint acknowledges that this assignment was made by Florida Power and not by the Union. But the complaint faults the *Union* for: (a) "allowing" the employer to make the assignment; and (b) failing "prior to [respondent's] employer, Florida Power, placing her in such a dangerous environment" either to train respondent or to ascertain that she had received training. P. 3, *supra*.

There is no doubt, under the collective bargaining agreement between the Union and Florida Power (which is part of the record of this case), that the Union plays no role in making job assignments. Nothing in the agreement requires the Company to consult the Union with respect to assignments or to seek or secure Union approval. Nor does the agreement give the Union authority to block an assignment. To the contrary, the agreement expressly declares that the assignment and reassignment of employees is one of the prerogatives of management. P. 2, *supra*.

To the extent the contract limits the Company's assignment power, it is by obligating the Company to give "[t]he safety of the employees . . . first consideration," and by providing that the Company is not to require any employee "to take any undue risk in the performance of his duties." Pp. 4-5, *supra*. The responsibility for complying with these rules rests with management; the contract expressly states that "[*s*]*upervisors and foremen* will be held responsible for the enforcement of safe work rules." *Id.* (emphasis added). What the Union is empowered to do if it believes an assignment had been made that contravenes these (or other) provisions of the contract is to protest the assignment to the Company and ultimately to grieve over the assignment. And the col-

lective bargaining agreement establishes an elaborate grievance-arbitration procedure to resolve claims of "violation of the terms of th[e] Agreement." J.A. 10-13.

At bottom, then, as the district court recognized, respondent's claim that the Union "allow[ed]" her to be assigned to the electrical substation without adequate training is a challenge to the manner in which the Union, as respondent's exclusive representative, exercised (or failed to exercise) its prerogatives under the grievance procedure. In her brief to the district court, respondent so stated, summarizing her claim in these words:

> Plaintiff was severely injured and disfigured as a direct result of the [Union's] *failure to enforce provisions contained in the collective bargaining agreement* entered into between [the Union] and [respondent's] employer. [Memorandum of Law in Opposition to Defendant's Motion to Dismiss at 4-5, R. 100-01; emphasis added.]

And in her brief in opposition in this Court, respondent continues to fault the Union for its "failure to protect her individual safety in her work assignment." Resp. Br. in Opp. at 2 n.1.[10]

As we proceed to show, because respondent's claim is inextricably based on alleged acts or, more precisely, alleged omissions by the Union in "enforc[ing] provisions contained in the collective bargaining agreement," the district court properly held that the sole source of law governing that claim is the duty of fair representation, and *not* any other body of federal (or state) common law.

---

[10] The court below read the complaint quite differently, asserting that "this complaint does not allege that the union failed to properly represent plaintiff in a claim against the employer," Pet. App. 28a; according to that court, the complaint concerns "a union's negligence in the training or assignment of one of its members," *id.* 27a. But as the quotations in text from respondent's brief to the district court makes clear, the appellate court misread the complaint and ignored the pertinent provisions of the collective bargaining agreement.

B. The duty of fair representation has been "implied under the scheme of the National Labor Relations Act," *DelCostello v. Teamsters*, 462 U.S. 151, 164 (1983), and the cause of action for breach of that duty likewise has been "judicially 'implied from the statute,'" *Electrical Workers v. Foust*, 442 U.S. 42, 47 (1978) *quoting Steele v. L.N.R. Co.*, 323 U.S. 192, 204 (1944). In *DelCostello* the Court traced the origins of, and reviewed the principles underlying, the duty:

> The duty of fair representation exists because it is the policy of the National Labor Relations Act to allow a single labor organization to represent collectively the interests of all employees within a unit, thereby depriving individuals in the unit of the ability to bargain individually or to select a minority union as their representative. In such a system, if individual employees are not to be deprived of all effective means of protecting their own interests, it must be the duty of the representative organization "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." [462 U.S. at 164 n.14.]

The fair representation duty thus is "equal in scope to [the union's] authority," *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976), and serves to protect individuals "stripped of traditional forms of redress by the provisions of federal labor law," *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).[11]

---

[11] Given the origin and purposes of the duty of fair representation as described in text, respondent could not be more wrong in suggesting that her complaint "only peripherally implicated the central concern of the labor laws . . . because [the] complaint challenged not the general safety of the workplace . . . but only the Unions' failure to protect [respondent's] individual safety in work assignment—a matter 'between the union and the worker [that] does not implicate national labor policy.'" Resp. Br. in Opp. at 2 n.1. Contrary to respondent's contention, the national labor policy concerns not only "the relationship between an em-

Over a period of more than four decades, the Court has defined and delimited the substance of the duty an exclusive representative owes to those it represents in a manner that assures that representative a "wide range of reasonableness in serving the unit it represents," *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953), so as to enable the union to perform its core function of maximizing "benefits for the bargaining unit as a whole" by "balancing individual and collective interests." *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 742 (1981). The Court likewise has developed a set of ancillary rules to govern the enforcement of the duty of fair representation, rules that also have been carefully developed "to accommodate a balance of interests," *DelCostello, supra*, 462 U.S. at 169, by "afford[ing] individual employees redress for injuries caused by union misconduct without compromising the collective interests of union members in protecting limited funds," *Foust, supra*, 442 U.S. at 50. These rules concern, *e.g.*, the type of remedies available for breaches of the duty, *see Foust, supra*; the nature of the injuries for which unions can be held accountable, *see Bowen v. United States Postal Service*, 459 U.S. 212 (1983); and the limitations period for filing fair-representation claims, *see DelCostello, supra*. Together the rules comprising the fair representation doctrine seek to further "the overarching legislative goal [of] facilitat[ing] collective bargaining and . . .

---

ployer and its employees collectively," *id.*, but also the relationship between the collective bargaining representative and the individual employee; indeed, the very means by which the labor laws address the "relationship between an employer and its employees collectively" is by structuring the union-*employee* relationship in such a way as to enable the union to bargain collectively on behalf of all employees in the bargaining unit. *See* 29 U.S.C. § 159. And the pressure point of the duty of fair representation is to regulate the union-employee relationship. Thus, the manner in which a union "protect[s] individual safety in work assignment" is very much a matter of federal concern, one that implicates the core policies of the duty of fair representation.

achiev[ing] industrial peace." *Foust, supra,* 442 U.S. at 47.

In light of the great pains the Court has taken to shape fair-representation law in a manner that balances competing interests and furthers the national labor policy, it necessarily follows that the rules that have been developed under the rubric of fair representation must be controlling in those § 301 suits which, like the instant case, *see* pp. 22-23, *supra,* concern the manner in which a union has gone about exercising its perogatives in invoking the grievance procedure of a collective bargaining agreement. To allow courts in such suits to deviate from fair-representation principles and develop and apply inconsistent rules of law—whether in the name of creating a federal common law of implied contractual obligations or of applying state law—"could undermine [the] careful accommodation" of individual and collective interests that the Court has struck in the fair representation context. *Foust, supra,* 442 U.S. at 50.

That is one of the lessons that *Vaca v. Sipes* teaches. *Vaca* arose out of the decision by a union not to appeal to arbitration a grievance over the plaintiff's discharge. Plaintiff filed what he termed in his brief to this Court "an uncomplicated action by a principal against his agent, under Missouri state law, for arbitrary and malicious failure to perform the agent's contractual duty." Br. for Resp. in No. 114 at 5. The Missouri courts upheld this claim, reasoning that so long as the "evidence supported [plaintiff's] assertion that he had been wrongfully discharged," the union was obligated under Missouri agency/contract law to prosecute a grievance over the discharge. This Court reversed the judgment that had been entered against the union, explaining:

> Although we conclude the state courts have jurisdiction in this type of case, we hold that federal law governs, that the governing federal standards were not applied here, and that the judgment of the Su-

> preme Court of Missouri must accordingly be reversed. [386 U.S. at 174.]

The Court elaborated on its holding as follows:

> It is now well-established that, as the exclusive bargaining representative of the employees in [plaintiff's] bargaining unit, the Union has a statutory duty fairly to represent all those employees. . . . It is obvious that [plaintiff's] complaint alleged a breach by the Union of a duty grounded in federal statutes, and that federal law therefore governs this cause of action. [*Id.* at 177.]

The teaching of *Vaca* for the instant case is clear: the federal duty of fair representation is the sole source of law for the courts to apply in judging a union's conduct in performing its functions as exclusive bargaining representative, including its function in enforcing collective bargaining agreements. Because, as we have seen, it is precisely the union's performance as bargaining representative that is at issue here, it necessarily follows that the fair-representation doctrine is fully applicable, notwithstanding the fact that, like the plaintiff in *Vaca*, respondent pleaded her complaint as a state-law claim.[12]

C. Applying the fair-representation doctrine, the district court properly dismissed respondent's complaint. As the district court recognized, under *DelCostello* the appli-

---

[12] Indeed, for the reasons stated in text, and based on the authority of *Vaca*, even if respondent's claim did not rest on the terms of the collective bargaining agreement, that claim still would be preempted by the duty of fair representation. Simply stated, what *Vaca* holds is that the states are not free to apply their tort law to regulate a union's performance in administering collective bargaining agreements; the union's activities in that regard are governed by the federal duty of fair representation. *Cf. Howard v. Lyons*, 360 U.S. 593, 597 (1959) (question of whether federal office enjoys absolute privilege in state defamation proceeding with respect to official reports he prepared is a federal question because "[t]he authority of a federal office to act derives from federal sources" and "[n]o subject could be one of more peculiarly federal concern").

cable limitations period for a breach-of-duty claim is the six-months statute of limitations contained in § 10(b) of the NLRA, 29 U.S.C. § 160(b). That limitations period was held applicable to fair-representation claims in order to further that aspect of the national labor policy which favors the "relatively rapid final resolution of labor disputes." *DelCostello, supra*, 462 U.S. at 168. This policy would be fatally undermined if would-be plaintiffs could circumvent the limitations period of § 10(b) by artful pleading. Thus, as the district court properly concluded, respondent's complaint, which was filed more than two years after respondent was injured and which seeks redress for the union's alleged failure to enforce the collective bargaining agreement so as to protect the respondent from an unsafe assignment, is governed by, and is untimely under the limitations period of § 10(b).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the case remanded with instruction to affirm the district court's dismissal.

Respectfully submitted,

LAURENCE J. COHEN
(Counsel of Record)
ELIHU I. LEIFER
RICHARD M. RESNICK
1125 15th St., N.W.
Washington, D.C. 20005
(202) 785-9300

ALLAN M. ELSTER
Point East Professional Bldg.
17971 Biscayne Blvd.
North Miami Beach, Florida 33160
Attorneys for Petitioners

Of Counsel:
LAURENCE GOLD
DAVID M. SILBERMAN
815 16th St., N.W.
Washington, D.C. 20006

Supreme Court, U.S.
FILED
OCT 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1360

In the Supreme Court of the United States

OCTOBER TERM, 1986

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and LOCAL 759 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, SYSTEM COUNCIL U-4,
Petitioners,

vs.

SALLY HECHLER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT

JOEL S. PERWIN
(Counsel of Record)
PODHURST, ORSECK, PARKS, JOSEFSBERG, EATON, MEADOW & OLIN, P.A.
Suite 800, City National Bank Building
25 West Flagler Street,
Miami, Florida 33130
(305) 358-2800

LAW OFFICES OF
SHELDON J. SCHLESINGER, P.A.
1212 S.E. Third Avenue
Ft. Lauderdale, Florida 33316
Counsel for Respondent

October 3, 1986

BEST AVAILABLE COPY

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT—

I. Sally Hechler's State-Law Tort Action Is Not Pre-Empted by §301 of the Labor Management Relations Act 12

A. Hechler's Complaint Invokes Common-Law Duties Which Arose Independently of the Union's Collective-Bargaining Agreement With the Company 12

B. Even If Hechler's Complaint Raised Issues Cognizable Only Under §301, the State Court Is Capable of Enforcing Federal Law on Those Issues 23

C. The Prosecution of Hechler's State-Law Complaint Will Not Interfere With the Federal Scheme 32

II. Even If Hechler Is Limited to a Contract Action Under §301, Her Complaint Was Timely Filed, and Therefore the District Court Erred in Dismissing It 43

CONCLUSION 47

TABLE OF CASES AND AUTHORITIES

Cases

A.M.R. Enterprises, Inc. v. United Postal Savings Association, 567 F.2d 1277 (5th Cir. 1978) 13

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 40

Allen-Bradley Local No. 1111, United Electrical Workers v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942) 6, 20, 24, 30, 31, 38

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 105 S. Ct. 1904, 85 L. Ed.2d 206 (1985) .....*passim*

Avco Corp. v. Aero Lodge No. 735, International Association of Machinists, 390 U.S. 557 (1968) 23, 46

Bellotti v. Baird, 428 U.S. 132 (1976) 5, 24

Baker v. General Motors Corp., 54 U.S.L.W. 5037 (U.S. July 2, 1986) 36

Banfield v. Addington, 104 Fla. 661, 140 So. 893 (1932) 13, 14, 18, 19

Belford Trucking Co. v. Zagar, 243 So.2d 646 (Fla. 4th DCA 1970) 13

Belknap, Inc. v. Hale, 463 U.S. 491 (1983) 36, 39

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983) 35

Bowen v. United States Postal Service, 459 U.S. 212 (1983) 10, 43

Brady v. Southern Ry., 320 U.S. 476 (1943) 27

Brotherhood of Railroad Trainmen v. Denver & R.G. W.R., 338 F.2d 407 (10th Cir. 1964), *cert. denied*, 380 U.S. 972 (1965) 34

Brown v. Hotel and Restaurant Employees, 468 U.S. 491 (1984) 6

Butts v. County of Dade, 178 So.2d 592 (Fla. 3rd DCA 1965) 46

Cedars of Lebanon Hospital Corp. v. European X-Ray Distributors, Inc., 444 So.2d 1068 (Fla. 3rd DCA 1984) 13

Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962) 18, 26, 27, 31

Charles Poe Masonry v. Spring Lock Scaffolding Co., 374 So.2d 487 (Fla. 1979) 21

Chomont v. Ward, 103 So.2d 635 (Fla. 1958) 13

Clafin v. Houseman, 93 U.S. 130 (1876) 24, 27, 28

Clayton v. International Union, United Automobile Workers, 451 U.S. 679 (1981) 10, 22, 36

Como Oil Co. v. O'Loughlin, 466 So.2d 1061 (Fla. 1985) (per curiam) 14

Connelly v. Gibson, 355 U.S. 41 (1957) 4

Crislip v. Holland, 401 So.2d 1115 (Fla. 4th DCA), *review denied*, 411 So.2d 380 (Fla. 1981) 19

Daigle v. Gulf State Utilities Co., 794 F.2d 974 (5th Cir. 1986) 45

DeVeau v. Braisted, 363 U.S. 144 (1960) 6

DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) 11, 17, 33, 40, 44, 45

Douglas v. Braman Porsche Audi, 451 So.2d 1038 (Fla. 3rd DCA 1984) 13

Doyle v. City of Coral Gables, 159 Fla. 802, 33 So.2d 41 (1947) 14, 46

Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc., 406 So.2d 515 (Fla. 4th DCA 1981), *review denied*, 417 So.2d 328 (Fla. 1982) 13

Eazor Express, Inc. v. International Brotherhood of Teamsters, 520 F.2d 951 (3rd Cir. 1975), *cert. denied*, 424 U.S. 935 (1976) 34

Electronic Security Systems Corp. v. Southern Bell Telephone & Telegraph Co., 11 Florida Law Weekly 283 (Fla. 3rd DCA February 7, 1986) 12

Farmer v. United Brotherhood of Carpenters, 430 U.S. 290 (1977) 17, 35, 38, 39

Fidelity & Casualty Co. v. L.F.E. Corp., 382 So.2d 363 (Fla. 2nd DCA 1980) 18

Flint v. Walling Mfg. Co., 167 Ind. 491, 79 N.E. 503 (1906) 16

Florida Power & Light Co. v. Mid-Valley, Inc., 763 F.2d 1316 (11th Cir. 1985) 21

Ford Motor Co. v. Huffman, 345 U.S. 330 (1952) 33

Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983) 7, 8, 17, 23, 25, 29

Francis v. Henderson, 425 U.S. 536 (1976) 25

Free v. Bland, 369 U.S. 663 (1962) 26

Glades County, Fla. v. Detroit Fidelity & Surety Co., 57 F.2d 449 (5th Cir. 1932) 16, 21

Goyings v. Eckerd Foundation, 403 So.2d 1144 (Fla. 2nd DCA 1981) 21

Gully v. First National Bank in Meridian, 299 U.S. 109 (1936) 20, 29

Hicks v. Miranda, 422 U.S. 332 (1975) 5

Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976) 33, 35

Hishon v. King & Spalding, 467 U.S. 69 (1984) 4

Hodkin v. Perry, 88 So.2d 139 (Fla. 1956) 21

Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) 19

Hoffman v. Pursue, Ltd., 420 U.S. 592 (1975) 5, 24

Holbrook v. City of Sarasota, 58 So.2d 862 (Fla. 1952) 14, 46

Howard v. Lyons, 360 U.S. 593 (1959) 26
Humphrey v. Moore, 375 U.S. 335 (1964) 27
Hurn v. Oursler, 289 U.S. 238 (1933) 30
International Association of Machinists v. Gonzales, 356 U.S. 617 (1958) 16, 17, 31
International Brotherhood of Electrical Workers v. A-1 Electric Service, Inc., 531 F.2d 1 (10th Cir.), *cert. denied*, 429 U.S. 832 (1976) 34
International Brotherhood of Electrical Workers v. Dave's Electric Service, Inc., 382 F. Supp. 427 (M.D. Fla. 1974) 21-22
International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42 (1978) 33, 37
International Longshoremen's Association v. Davis, 476 U.S. ....., 106 S. Ct. 1904, 90 L. Ed.2d 389 (1986) 5, 27
International Union of Elevator Constructors v. Home Elevator Co., 55 U.S.L.W. 2129 (7th Cir. August 12, 1986) 45
International Union, United Automobile Workers v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) 11, 17, 44, 45, 46
Juidice v. Vail, 430 U.S. 327 (1977) 5, 24
Kelly v. Kosuga, 358 U.S. 516 (1959) 26
Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938) 26, 31
Lewis v. Benedict Coal Corp., 259 F.2d 346 (6th Cir. 1958), *modified on other grounds*, 361 U.S. 459 (1960) 34
Lewis v. Guthartz, 428 So.2d 222 (Fla. 1983) 13
Lincoln Gas & Electric Light Co. v. Lincoln, 250 U.S. 256 (1919) 30
Linn v. Plant Guard Workers, 383 U.S. 53 (1966) 17, 35
Local 100 of the United Association of Journeymen v. Borden, 373 U.S. 690 (1963) 17

Local 174, Teamsters v. Lucas Flower Co., 369 U.S. 95 (1962) 3, 7-8, 9, 10, 25, 27, 46
Local No. 207, International Association of Bridge Workers v. Perko, 373 U.S. 701 (1963) 17
Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976) 36
Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149 (1908) 23, 28
Louisville & Nashville R. Co. v. Western Union Telegraph Co., 237 U.S. 300 (1915) 25
Lueck v. Aetna Life Ins. Co., 112 Wisc.2d 675, 342 N.W. 2d 699 (1984), *rev'd*, 471 U.S. 202 (1985) 8
Malone v. White Motor Corp., 435 U.S. 497 (1978) 7
Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. ....., 106 S. Ct. 3229, 92 L. Ed.2d 650 (1986) 20, 23, 25, 29
Metropolitan Life Ins. Co. Commonwealth of Massachusetts, 471 U.S. ....., 105 S. Ct. 2380, 85 L. Ed.2d 728 (1985) 6, 17, 31, 36, 41
Minneapolis, St. Paul, & S.S.M.R. Co. v. Poplar, 237 U.S. 369 (1915) 28, 29
Mondou v. New York, N.H. & H.R. Co., 223 U.S. 1 (1912) 24, 30
Moore v. Chesapeake & Ohio R. Co., 291 U.S. 205 (1933) 25, 28, 29
Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971) 17
Murdock v. City of Memphis, 20 Wall. 590 (U.S. 1874) 25
NLRB v. Boeing Co., 412 U.S. 67 (1973) 17
NLRB v. City Disposal Systems, Inc., 465 U.S. 822 (1984) 16, 33, 35

Navajo Circle, Inc. v. Development Concepts Corp., 373 So.2d 689 (Fla. 2nd DCA 1979) 13, 15

O'Bryan v. Linton, 41 So.2d 169 (Fla. 1949) 21

Ohio Civil Rights Commission v. Dayton Christian Schools, 54 U.S.L.W. 4860 (U.S. June 27, 1986) 5, 24

Pan American Petroleum Corp. v. Superior Court of the State of Delaware, 366 U.S. 656 (1961) 23

Parrish v. Clark, 107 Fla. 598, 145 So. 848 (1933) 14, 15

Picard v. Connor, 404 U.S. 270 (1971) 25

Railroad Commission v. Pullman, 312 U.S. 496 (1941) 4

Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) 10, 32, 35, 40

Retail Clerks International Association v. Lion Dry Goods, Inc., 369 U.S. 17 (1962) 17

Robertson v. Deak Perera (Miami), Inc., 396 So.2d 749 (Fla. 3rd DCA), *review denied*, 407 So.2d 1105 (Fla. 1981) 15

Rollins, Inc. v. Heller, 454 So.2d 580 (Fla. 3rd DCA 1984), *review denied*, 461 So.2d 114 (Fla. 1985) 15

Rolls v. Bliss & Nyitray, Inc., 408 So.2d 229 (Fla. 3rd DCA), *cert. dismissed*, 415 So.2d 1359 (Fla. 1982) 13

Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) 29

Royal Typewriter Co. v. Xerographic Supplies Corp., 719 F.2d 1092 (11th Cir. 1983) 13

Salcedo v. Associacion Cubana, Inc., 368 So.2d 1337 (Fla. 3rd DCA), *cert. denied*, 378 So.2d 342 (Fla. 1979) 21

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 17, 36, 38

Scofield v. NLRB, 394 U.S. 423 (1969) 17

Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978) 6, 39

Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900) 24, 27
Shulthis v. McDougal, 225 U.S. 561 (1912) 20, 28
Siler v. Louisville & Nashville R. Co., 213 U.S. 175 (1909) 30
Smith v. Evening News Association, 371 U.S. 195 (1962) 28-29, 36, 40, 46
Smith v. Kansas City Title & Trust Co., 225 U.S. 180 (1920) 29
Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424 (1939) 34
Southern Bell Telephone & Telegraph Co. v. Hanft, 436 So.2d 40 (Fla. 1983) 13
St. Clair v. Local Union No. 515 of the International Brotherhood of Teamsters, 422 F.2d 128 (6th Cir. 1969) 34
State Tax Commission v. Van Cott, 306 U.S. 511 (1939) 5
Steele v. Louisville & Nashville R. Co., 323 U.S. 192 (1944) 33
Taylor v. Anderson, 234 U.S. 74 (1914) 23
Testa v. Katt, 330 U.S. 386 (1947) 24, 27
Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448 (1957) 46, 47
United Association of Journeymen v. Local 334, 452 U.S. 615 (1981) 17
United Electrical Workers v. Westinghouse Electric Corp., 65 F. Supp. 420 (E.D. Pa. 1946) 27
United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981) 11, 33
United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940) 6
United States v. City of New Britain, Connecticut, 347 U.S. 81 (1954) 26
United States v. Equitable Life Assurance Society, 384 U.S. 323 (1966) 25

United States v. Standard Oil Co. of California, 332 U.S. 301 (1947) 31, 42
United States v. Waddill, Holland & Flinn, 323 U.S. 353 (1945) 26
United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960) 35
Vaca v. Sipes, 386 U.S. 171 (1967) 32, 33, 34, 36, 37, 40
Van Tuyn v. Zurich American Ins. Co., 447 So.2d 318 (Fla. 4th DCA 1984) 21
Vining v. Avis Rent-A-Car System, Inc., 354 So.2d 54 (Fla. 1978) (per curiam) 19
Vorndran v. Wright, 367 So.2d 1070 (Fla. 3rd DCA) (per curiam), *cert. denied*, 378 So.2d 350 (Fla. 1979) 15
Wardair Canada, Inc. v. Florida Dept. of Revenue, 54 U.S.L.W. 4687 (U.S. June 18, 1986) 6
Webb v. Webb, 451 U.S. 493 (1981) 5, 25
West v. Caterpillar Tractor Co., 336 So.2d 80 (Fla. 1976) 13
Westinghouse Electric Corp. v. International Brotherhood of Electrical Workers, 561 F.2d 521 (4th Cir. 1977), *cert. denied*, 434 U.S. 1036 (1978) 34
Wheeldin v. Wheeler, 373 U.S. 647 (1963) 26
White Construction Co. v. Dupont, 455 So.2d 1026, 1029 (Fla. 1984) 14
Whitehead v. Rizon East Association, 425 So.2d 627 (Fla. 4th DCA 1983) 18
Wilwording v. Swenson, 404 U.S. 249 (1971) 25
Wisconsin Department of Industry v. Gould, ... U.S. ....., 106 S. Ct. 1057, 88 L. Ed.2d 282 (1986) 27, 47
Younger v. Harris, 401 U.S. 37 (1971) 5

Statutory Authorities

28 U.S.C. §1441(b) 29
§301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185 ..... *passim*
§101(a)(4) of the Landrum-Griffin Act, 29 U.S.C. §411(a)(4) 22
§8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1) 33
§10(b) of the National Labor Relations Act, 29 U.S.C. §160(b) 45
§95.11(2)(b), Fla. Stat. (1985) 45

Miscellaneous

4 *Corbin on Contracts* §818 (1951) 22, 46
W. Keeton, *Prosser and Keeton on the Law of Torts* §53 (1984) 16
Williston on Contracts, §1341, at 214-23 (3rd ed. 1968) 46
Note, *Supreme Court Review of State Interpretations of Federal Law Incorporated by Reference*, 66 Harv. L. Rev. 1498 (1953) 5

No. 85-1360

In the Supreme Court of the United States

OCTOBER TERM, 1986

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and LOCAL 759 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, SYSTEM COUNCIL U-4,
Petitioners,

VS.

SALLY HECHLER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The Union's statement of the case is accurate, with the exception of its truncated description of the duties ascribed to the Union in Sally Hechler's state-law complaint (J.A. 3-6).[1] Repeatedly throughout its brief (*e.g.*, p. 3) the Union acknowledges only those parts of Hechler's complaint which invoke its collective-bargaining agreement with the Company, omitting Hechler's explicit allegation

---

1. Equally truncated (brief at 5-6) is the Union's two-sentence description of the court of appeals' opinion (Pet. App. 11a-32a), which does a serious disservice to that court's thoughtful consideration of the issues in question.

of additional duties arising from "the relationship by and between the said Defendants and the Plaintiff whereby the Plaintiff, SALLY HECHLER, was a dues-paying member of the said Defendants" (J.A. 4). In part because of that "relationship," Hechler charged that "the Defendant owed the Plaintiff the duty to assure that the Plaintiff was provided safety in her work place and a safe work place, and further, [that] the Plaintiff would not be required or allowed to take undue risks in the performance of her duties which were not commensurate with her training and experience or to work in an area which was not safe as commensurate with her training and experience" (*id.*).

In this context, the Union's repeated attempt to disclaim any contractual obligation to protect Sally Hechler's safety (*e.g.*, brief at 7, 22) is particularly inappropriate. It would be inappropriate even if Hechler's claim were grounded solely in her status as a third-party beneficiary of the Union's contract with the Company, because the question of the Union's duty to Sally Hechler has not yet been litigated in any court.[2] It is particularly inappropriate because the Union's discussion of this extraneous question is confined to the language of its contract with the Company, while Hechler's proof will also explore both her formal and practical relationship with the Union itself. We trust that the Court will appreciate the Union's diversion for what it is—a suggestion that this case really isn't important, because Hechler is bound to lose it eventually. That suggestion, which of course we reject, is irrelevant to the issues before the Court.

---

2. Even assuming *arguendo* that this question of duty would have been appropriate as a basis for dismissal, which is the only motion at issue here, the fact is that the Union did not raise it in its motion to dismiss (Record at 65-89), and the district court did not consider it (Record at 119-23).

SUMMARY OF THE ARGUMENT

On the basis of a single pleading, the Union would deny Sally Hechler her right of access to Florida's common law of negligence, which in countless other contexts provides a standard for prescribing the duties arising from relationships such as those at issue here. Despite the breadth and generality of Hechler's complaint, and the many alternative sources of duty which it embraces, the Union would close the state court's door at the threshold, for reasons which all reduce to a presumptive distrust of the independence of Florida law and the integrity of Florida courts. The Union insists that Hechler's charge of negligence is only the mask of a contract claim under the collective bargaining agreement—a claim clearly committed to the scrutiny of federal common law under §301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185;[3] that Florida's common law amounts to little more than the trapping of this disguise; and that Florida's courts must bow before the banner of federal supremacy which the Union so insistently waves.

At this early stage of the litigation, the Union's argument necessarily is based on mere assumption—that Florida courts are unwilling or unable to hold the law of negligence to its own true course, and are unprepared or ill-disposed, notwithstanding their constitutional duty, to respect federal law. That assumption is wrong. It is wrong because under Florida law, the Union's duty to Sally Hechler may exist independently of its collective-bargaining agreement with the Company, and may be enforced without reference to that agreement. It is wrong because the Florida courts

---

3. *See Local 174, Teamsters v. Lucas Flower Co.*, 369 U.S. 95 (1962); *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

are entirely capable of fulfilling their constitutional obligation to enforce federal law where it applies. And it is wrong because Sally Hechler's state action—whether based on state-created duties existing independently of the collective-bargaining agreement, or upon the federal law which governs the duties prescribed by that agreement—may be prosecuted free of any interference with the important values protected by the federal labor laws.

In this light, the Union's pietistic invocation of the federal labor laws reduces to mere speculation—that Hechler's suit might conceivably put at risk the uniformity of the common law of collective-bargaining agreements which the federal courts enforce under §301, or perhaps circumvent the important dispute-resolution procedures which those laws encourage. As the Union would have it, these theoretical risks are enough to displace state law; questions of probability or degree are evidently beside the point.

Acceptance of this position would elevate federal law to a level of supremacy which enjoys no analogy in any other context. It would uphold the dismissal of Hechler's action, despite "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[4] It would act upon mere assumptions about state law, even though the federal courts should have "little confidence in our independent judgment regarding the application of [state] law . . . ." *Railroad Commission v. Pullman*, 312 U.S. 496, 499 (1941). It would deny a state

---

4. *Connelly v. Gibson*, 355 U.S. 41, 45-46 (1957). *Accord, Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

court jurisdiction, despite the pervasive Congressional "desire to permit state courts to try state cases free from interference by federal courts"[5]—a desire which reflects "[t]he seriousness of federal judicial interference with state civil functions . . . ."[6] It would assume the worst about our state courts, even though the "[p]rinciples of comity in our federal system require that state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on federal law, or if the litigation is wholly private, construing and applying the applicable federal requirements."[7] And despite bearing the burden to sustain its own affirmative defense of pre-emption,[8] the Union would foresake the central purpose of pre-emption—to grapple "not with the theoret-

---

5. *Younger v. Harris*, 401 U.S. 37, 43 (1971).

6. *Hoffman v. Pursue, Ltd.*, 420 U.S. 592, 603 (1975). *See generally Ohio Civil Rights Commission v. Dayton Christian Schools*, 54 U.S.L.W. 4860, 4862 (U.S. June 27, 1986); *Juidice v. Vail*, 430 U.S. 327, 334-35 (1977); *Hicks v. Miranda*, 422 U.S. 332, 349 (1975); *Younger v. Harris, supra*, 401 U.S. at 44-45.

7. *Webb v. Webb*, 451 U.S. 493, 499 (1981) (federal question must be presented to state court before Supreme-Court review, because state court may find a way to avoid the question). Thus for example in *State Tax Commission v. Van Cott*, 306 U.S. 511 (1939), this Court remanded to the state court the question of whether its construction of a state statute exempting governmental salaries from state income tax was based upon state law, or instead upon the command of the supremacy clause, in light of a Supreme-Court opinion on a constitutional question, which opinion had since been overruled. In an apparently-unreported opinion, the state court rested its interpretation solely in the language of the statute, thereby avoiding the constitutional question. *See* Note, *Supreme Court Review of State Interpretations of Federal Law Incorporated by Reference*, 66 Harv. L. Rev. 1498, 1506 & n.46 (1953). *See also Bellotti v. Baird*, 428 U.S. 132, 148 (1976) (abstention required if the state act in question is susceptible of an interpretation which would avoid the constitutional question).

8. *See International Longshoremen's Association v. Davis*, 54 U.S.L.W. 4512, 4517 (U.S. May 27, 1986).

ical disputes but with concrete and specific issues raised by actual cases."[9]

As many of the foregoing citations demonstrate, these general standards are no less applicable in the labor-law context: "[T]he history of the labor pre-emption doctrine in this Court does not support an approach which sweeps away state court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected." *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 188 (1978). Thus, despite its "powerful" "pre-emptive

---

9. *Allen-Bradley Local No. 1111, United Electrical Workers v. Wisconsin Employment Relations Board*, 315 U.S. 740, 746 (1942) ("They will not be anticipated but will be dealt with only as they are appropriately raised upon a record before us"), *citing United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 423 (1940) ("Constitutional questions are not to be dealt with abstractly"). *Accord, Brown v. Hotel and Restaurant Employees*, 468 U.S. 491, 501 (1984) (absent evidence of "congressional intent to occupy the field, we may nevertheless find state law to be displaced to the extent that it actually conflicts with federal law"); *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 201 (1978) (question not whether it is "theoretically possible" that an issue may be decided in two forums, but whether there is "in fact" a "risk of overlapping jurisdiction"); *DeVeau v. Braisted*, 363 U.S. 144, 152 (1960) (plurality opinion) ("Would Congress, with a lively regard for its own federal labor policy, find in this state enactment a true, real frustration, however dialectically plausible, of that policy"), *quoted in Brown v. Hotel and Restaurant Employees*, 468 U.S. 491, 508 (1984). *Accord, Metropolitan Life Ins. Co. v. Commonwealth of Massachusetts*, 471 U.S. ____, 105 S. Ct. 2380, 85 L. Ed.2d 728, 745 (1985). *See generally Wardair Canada, Inc. v. Florida Dept. of Revenue*, 54 U.S.L.W. 4687, 4688 (U.S. June 18, 1986) ("[W]e have consistently emphasized that the first and fundamental inquiry in any pre-emption analysis is whether Congress intended to displace state law, and where a congressional statute does not expressly declare that state law is to be pre-empted, and where there is no actual conflict between what federal and state law prescribe, we have required that there be evidence of congressional intent to pre-empt the specific field covered by the state law").

force," *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983), not even the talismanic §301 should displace these central rules of federal/state relations. Even here, the "courts sustain a local regulation 'unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.' " *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S. Ct. 1904, 85 L. Ed.2d 206, 213-14 (1985) (hereinafter "*Allis-Chalmers*"), *quoting Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).

It is ironic that the Union would lean so heavily upon *Allis-Chalmers*, which illustrates the kind of practical balancing of interests which the Union's brief eschews, in preference for the mere incantation of general principles. First, *Allis-Chalmers* forbade the application of Wisconsin state law only after concluding that the state tort action was "firmly rooted in the expectations of the parties that must be evaluated by federal contract law."[10] Because the very point at issue was thus encompassed by §301, and because such questions must be resolved under a uniform body of federal law, *see Local 174, Teamsters v.*

---

10. 85 L. Ed.2d at 219. The Court rejected the Wisconsin courts' conclusion that wholly apart from any interpretation of the collective-bargaining agreement, state law might punish the failure to perform a contractual obligation in good faith, since the very recognition of such a state-law duty of good faith itself would embrace "assumptions about the scope of the contract provision which [the state court] had no authority to make under state law." *Id.* at 217. To the contrary, because §301 is broad enough, by ordinary principles of contract, to encompass claims based upon both express and implied contractual obligations, the state action clearly adjudicated issues cognizable under §301: "[I]t is a question of federal contract interpretation whether there was an obligation under this labor contract to provide the payments in a timely manner, and if so, whether Allis-Chalmers' conduct breached that implied contract provision." *Id.* at 218.

Lucas Flower Co., 369 U.S. 95, 103-04 (1962) (hereinafter "*Lucas Flower*"), the Wisconsin courts' application of state law was impermissible. *Allis-Chalmers*, 85 L. Ed.2d at 214-16. At the same time, however—consistent with its earlier acknowledgment that §301 does not displace every state action "merely relating to a contract within [its] coverage," since some such actions may disclose a "connection" with the collective-bargaining agreement "too attenuated" to implicate federal concerns, *Franchise Tax Board v. Construction Laborers' Vacation Trust*, 463 U.S. 1, 25 n.28, 27 n.32 (1983)—the Court acknowledged in *Allis-Chalmers* that "it would be inconsistent with congressional intent under [§301] to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." 85 L. Ed.2d at 216. In contrast, the Union here would forbid the state action merely because it might theoretically require resort to the collective-bargaining agreement, even though there are several alternative sources of duty under state law.

Second, *Allis-Chalmers* reached this Court only after the Wisconsin Supreme Court had expressly disclaimed any obligation to incorporate federal law into the state cause of action—a commonplace and unobjectionable event in our federal system—and therefore had defied the command of the supremacy clause.[11] In contrast, the Union here has removed the case and secured its dismissal before any Florida court has had the opportunity to play its proper role in our federal system. Even if the Union were correct that Sally Hechler's claim necessarily embraces matters committed to federal law, there is no reason for believing (apart from the Union's cynicism) that the state court

---

11. *Lueck v. Aetna Life Ins. Co.*, 112 Wisc.2d 675, 342 N.W.2d 699 (1984), *rev'd*, 471 U.S. 202 (1985).

would defy the supremacy clause and insist upon state law instead.

In this respect, the instant case may be no different from *Lucas Flower,* in which, as in *Allis-Chalmers,* the highest state court had affirmed a judgment under state law. *Lucas Flower,* 369 U.S. at 97. The holding of *Lucas Flower* is **not** that the entire state action was pre-empted by §301. The holding is that state law must give way on those **aspects** of the controversy committed by §301 to a uniform interpretation under federal law: "Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of Lincoln Mills, requiring **issues** raised in suits of a kind covered by §301 to be decided according to the precepts of federal labor policy." 369 U.S. at 103 (our emphasis).[12] By its plain language, *Lucas Flower* simply requires the state court to enforce federal law where appropriate. Indeed, noting that the propriety of the state court's damage award was not at issue, 369 U.S. at 97 n.2, this Court **affirmed** the state judgment in *Lucas Flower,* because the result reached in the state action was consistent with the requirements of §301. The lesson of *Lucas Flower* is that, unless it is somehow **otherwise objectionable,** a state action is permissible even if it embraces issues cognizable under §301, so long as the state court applies federal law to those issues. Even

---

12. *See id.* at 103 (our emphasis) ("We hold that in a case such as this, **incompatible** doctrines of local law must give way to principles of federal labor law"); 104 (our emphasis) ("[W]e cannot but conclude that in enacting §301 Congress intended doctrines of federal labor law uniformly to prevail over **inconsistent** local rules"). Even *Allis-Chalmers* says that the Wisconsin court had applied state law to make assumptions about the contract which it "had no authority to make under **state** law," 85 L. Ed.2d at 217 (our emphasis), suggesting that it might have had the authority to make them under **federal** law. As we note in a moment, the Wisconsin court was held to lack that authority for other reasons—not because it was incapable of applying **federal** law.

the presumptive involvement of federal questions is no warrant for pre-emption.

The third aspect of *Allis-Chalmers* is that even if the Wisconsin court had applied federal law on the question of liability, the mere availability of the state action was offensive to the purposes of the federal scheme—which explains why the Court found the action to be pre-empted rather than, by analogy to *Lucas Flower*, remanding it to state court with instructions to apply federal law.[13] In *Allis-Chalmers*, the employee could have initiated a grievance procedure, culminating in binding arbitration, to remedy the union's administration of his disabliity claims, but instead sought relief in state court. 85 L. Ed.2d at 210-12. In contrast to the federal §301 action, *see id.* at 220, the state court required no exhaustion of this grievance procedure. Of course, encouragement of grievance arbitration is a central policy of federal labor law,[14] and thus the mere existence of the state remedy was inconsistent with the federal scheme: "[T]he arbitrator's role in every case could be bypassed easily if §301 is not understood to preempt such claims." 85 L. Ed.2d at 220.[15]

---

13. As the Court noted in *Allis-Chalmers*, 85 L. Ed.2d at 214: "The question posed here is whether this particular Wisconsin tort, as applied, would frustrate the federal labor-contract scheme established in §301."

14. *See id.* at 220-21; *Bowen v. United States Postal Service*, 459 U.S. 212, 225 (1983); *Clayton v. International Union*, 451 U.S. 679, 686-87 (1981); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965).

15. In this respect, *Allis-Chalmers* was foreshadowed by *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), in which the worker by-passed the grievance procedures provided by the collective-bargaining agreement, and brought a state contract action against the employer for severance pay, in which he was not required to exhaust the grievance procedures. *Id.* at 650-52. As in *Allis-Chalmers*, the state action was offensive to the federal system whether or not it purported to apply federal contract law. *See id.* at 653-54.

But the Union here has renounced such a practical assessment of the state action's impact upon federal interests, preferring instead to conjure hollow images of supremacy. As we will demonstrate, that was the only tactic available: Sally Hechler's state action will not deter or interfere with the pre-accident dispute-resolution procedures sanctioned by the federal labor laws; it will not punish any conduct which Congress intended to leave unpunished; it will not interfere in any way with the important values which underlie the federal labor laws. In short, this case is plainly not *Allis-Chalmers*. The court of appeals was right to hold that Sally Hechler should have her day in state court.

Even if all the foregoing arguments are rejected by this Court, the Union is still wrong in claiming that Hechler's complaint was time-barred. Even assuming that Hechler is remanded to a §301-claim and no other, the district court was wrong to apply the statute of limitations prescribed in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). As the Court noted, 462 U.S. at 165, the *DelCostello* suit was "not a straightforward breach-of-contract suit under §301 . . . but a hybrid §301/fair representation claim, amounting to 'a direct challenge to "the private settlement of disputes under [the collective-bargaining agreement]." ' "[16] But the instant suit would not be similarly analogous to an action challenging some prior dispute-resolution process, but is much more like a state action for breach of contract or negligence. In no event should *DelCostello* apply, and for that reason Hechler's claim was not time-barred.

---

16. *Id.* at 165, *quoting United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 66 (1981) (Stewart, J., concurring), *quoting Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 702 (1966).

ARGUMENT

I. Sally Hechler's State-Law Tort Action Is Not Pre-Empted by §301 of the Labor Management Relations Act.

A. Hechler's Complaint Invokes Common-Law Duties Which Arose Independently of the Union's Collective-Bargaining Agreement With the Company. The Union repeatedly insists (*e.g.*, brief at 9, 15-16 & n.5, 20 n.9) that the only state-law negligence claim available to Hechler is one based upon the Union's duties under its collective-bargaining agreement with the Company. To sustain its heavy burden on this point, the Union merely invokes this Court's declaration in *Allis-Chalmers* that the tort claim there was nothing "more than a way to plea a certain kind of contract violation in tort in order to recover exemplary damages," 85 L. Ed.2d at 219; and then cites a handful of Florida cases which purport to establish that tort and contract law in Florida are interchangeable (brief at 15-16 & n.5, 18 n.7). But this case is not *Allis-Chalmers;* Sally Hechler's claim is not a contract case in tort's clothing; and the Union's lawyers have spent too little time with Florida law.

At the threshold, the Union is clearly wrong to say that tort actions and contract actions in Florida are no different. To the contrary in Florida, "a breach of contract, alone, cannot constitute an action in tort." *Electronic Security Systems Corp. v. Southern Bell Telephone & Telegraph Co.*, 11 Florida Law Weekly 283 (Fla. 3rd DCA February 7, 1986). The contract is a "mere inducement, creating the state of things which furnishes the occasion of the tort, but not the basis for recovery for it, and in all

such cases the remedy is an action *ex delicto* on the case."[17] Thus, even when the tort action is based on the negligent performance of a specific contractual obligation, there are vast differences in Florida between prosecution of the action in contract and in tort.[18] It is not surprising, there-

---

17. *Banfield v. Addington*, 104 Fla. 661, 140 So. 893, 895 (1932). *Accord, Douglas v. Braman Porsche Audi*, 451 So.2d 1038, 1039 (Fla. 3rd DCA 1984); *Navajo Circle, Inc. v. Development Concepts*, 373 So.2d 689, 691 (Fla. 2nd DCA 1979) ("[T]he duty sued on in a negligence action is not the contractual promise but the duty to use reasonable care in affirmatively performing that promise"); *Belford Trucking Co. v. Zagar*, 243 So.2d 646, 648 (Fla. 4th DCA 1970).

18. In addition to the tort plaintiff's obligation to prove negligence in the performance of a contractual obligation, *see* note 17, *supra*, Florida recognizes significant differences between contract damages and tort damages. *Compare A.M.R. Enterprises, Inc. v. United Postal Savings Association*, 567 F.2d 1277, 1281 (5th Cir. 1978) (Florida law) (contract damages must have been reasonably contemplated by the parties at time contract made) *with Chomont v. Ward*, 103 So.2d 635, 638 (Fla. 1958) (tort damages are those proximately caused by defendant's conduct). And in a case like this one, in which the plaintiff was not a party to the contract in question, his tort action depends upon additional proof that the injury was a reasonably foreseeable consequence of the defendant's negligent performance of contractual duties owed to others. *See West v. Caterpillar Tractor Co.*, 336 So.2d 80 (Fla. 1976); *Cedars of Lebanon Hospital Corp. v. European X-Ray Distributors, Inc.*, 444 So.2d 1068, 1070-72 (Fla. 3rd DCA 1984); *Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc.*, 406 So.2d 515, 519 (Fla. 4th DCA 1981), *review denied*, 417 So.2d 328 (Fla. 1982).

In addition, in marked contrast to the apparent Wisconsin practice, *see Allis-Chalmers*, 85 L. Ed.2d at 219, the mere commission of a tort in Florida—although a necessary condition for an award of punitive damages, *see Southern Bell Telephone & Telegraph Co. v. Hanft*, 436 So.2d 40, 42 (Fla. 1983); *Lewis v. Guthartz*, 428 So.2d 222, 223-24 (Fla. 1983)—is not sufficient. The plaintiff must also prove that the tort caused some compensatory loss which was not also occasioned by the simultaneous breach of contract, *see Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1106 (11th Cir. 1983) (Florida law); *Rolls v. Bliss & Nyitray, Inc.*, 408 So.2d 229, 237 (Fla. 3rd DCA), *cert. dismissed*, 415 So.2d 1359 (Fla. 1982), and in addition that the tort was committed in a willful, wanton or

(Continued on following page)

fore, that immediately after the passage quoted by the Union (brief at 16) from *Parrish v. Clark*, 107 Fla. 598, 145 So. 848, 850 (1933), the Florida court says that the two causes of action are "distinct, the only limitation on a suit for either or both being that the same party cannot be compensated twice . . . ."[19]

We must acknowledge, however, that the Union's position does not depend upon its sweeping misstatement of Florida law. The Union's necessary argument is not that the alternative causes of action are identical in all respects, but that both necessarily depend upon a construction of the underlying contract at issue. But though the Union bears the burden of proof on this question, and quotes no less than three Florida cases affirming that a tort action "may" be based upon the negligent breach of a

---

Footnote continued—

reckless way. *See Como Oil Co. v. O'Loughlin*, 466 So.2d 1061, 1062 (Fla. 1985) (per curiam); *White Construction Co. v. Dupont*, 455 So.2d 1026, 1029 (Fla. 1984).

19. Most of the cases cited by the Union (brief at 16), which hark back to the world of common-law pleading, reject defense contentions that the plaintiff was required to proceed only in contract, or only in tort, holding instead that the plaintiff was permitted to plead either claim. *See Holbrook v. City of Sarasota*, 58 So.2d 862 (Fla. 1952); *Doyle v. City of Coral Gables*, 33 So.2d 41 (Fla. 1947); *Parrish v. Clark*, 107 Fla. 598, 145 So. 848 (1933); *Banfield v. Addington*, 104 Fla. 661, 140 So. 893 (1932). They do so, however, not because the two causes of action are identical, but because they are distinct. In the leading case of *Banfield v. Addington*, for example, decided at a time when a married woman in Florida was immune from suit for contract, an action based upon her negligent performance of a contractual obligation was permissible, precisely because it was not tantamount to an action for breach of contract. For the same reason, *Banfield* was precedent for later holdings that where a tort action based on a contract is barred by sovereign immunity, the analogous contract action is not. *Holbrook v. City of Sarasota*, 58 So.2d at 863-64; *Doyle v. City of Coral Gables*, 33 So.2d at 41-42. Thus, the Union has not simply misread a few of the older Florida cases; it has cited them for precisely the opposite proposition for which they stand.

specific contractual obligation, it cites no authority that the common-law duties cognizable in such contexts are **confined** to the contract.[20]

As a general proposition under Florida law, even when the parties have a relationship created by a specific contract, they may also have a relationship, prescribing common-law duties, which exists outside of the contract:

> The duty exists independent of the contract. Existence of a contract may uncontrovertibly establish that the parties owed a duty to each other to use reasonable care in performance of the contract, but it is not an exclusive test of the existence of that duty. Whether a defendant's duty to use reasonable care extends to a plaintiff not a party to the contract is determined by whether that plaintiff and defendant are in a relationship in which the defendant has a duty imposed by law to avoid harm to the plaintiff.[21]

---

20. The only authority offered (brief at 15) is a "*cf.*" citation to *Vorndran v. Wright*, 367 So.2d 1070 (Fla. 3rd DCA) (per curiam), *cert. denied*, 378 So.2d 350 (Fla. 1979), in which the court held that since the architect did not warrant the performance of his contractor or any sub-contractors in the architect's contract with the property's owner, and since each individual sub-contractor had a statutory duty to comply with safety regulations, the architect had no duty to an employee of a sub-contractor who was injured on the job. Since the only relationship between the architect and the sub-contractor's employee was the primary contract with the owner, that holding was correct. But the case does not remotely suggest that Florida law would recognize no other sources of duty in proper cases.

21. *Navajo Circle, Inc. v. Development Concepts Corp.*, 373 So.2d 689, 691 (Fla. 2nd DCA 1979). *Accord, Rollins, Inc. v. Heller*, 454 So.2d 580, 583 & n.1 (Fla. 3rd DCA 1984), *review denied*, 461 So.2d 114 (Fla. 1985). *See also Robertson v. Deak Perera (Miami), Inc.*, 396 So.2d 749, 752 (Fla. 3rd DCA) (Schwartz, C. J., dissenting) ("A common law duty exists when a court says it does because it thinks it should"), *review denied*, 407 So.2d 1105 (Fla. 1981). Thus, in a case relied upon by the Florida Supreme Court in *Parrish v. Clark*, 145 So. at 850, the Indiana Supreme Court declared that "[w]here the duty has its roots in contract, the undertaking to observe due care

(Continued on following page)

On its face, therefore, Florida's common law of negligence does not require that Sally Hechler look only to the collective-bargaining agreement as the source of the Union's duties.

From this perspective, it is not difficult to envision Sally Hechler's assertion of duties growing out of her direct relationship with the Union, even apart from her status as a third-party beneficiary of its contract with the Company. It may be that Hechler's membership in the Union alone gave rise to some reasonable expectation that the Union would monitor the Company's job assignments in light of its members' skills. As the Court has noted, "[t]his contractual conception of the relation between a member and his union widely prevails in this country."[22] And

---

Footnote continued—

may be implied from the relationship . . . ." *Flint v. Walling Mfg. Co.*, 167 Ind. 491, 79 N.E. 503, 505 (1906). *See generally* W. Keeton, *Prosser and Keeton on the Law of Torts* §53, at 358-59 (1984).

22. *International Association of Machinists v. Gonzales*, 356 U.S. 617, 618 (1958). *Cf. Glades County, Fla. v. Detroit Fidelity and Surety Co.*, 57 F.2d 449, 452 (5th Cir. 1932) (Florida law) ("surety . . . has an interest in the fund as a pledged security which arose out of the contract of suretyship, and which it may assert in its own right and not merely through the principal . . ."). We agree with the Union that under both federal law (*see* brief at 19-20 & n.8) and Florida law (brief at 20 n.9), implied obligations are as much a part of a contract as express obligations. That was a central holding of *Allis-Chalmers* itself, 85 L. Ed.2d at 217-20. But we are not speaking here about obligations implied by the collective-bargaining agreement between the Union and the Company, which are cognizable under §301, but of the obligations running directly from the Union to its members, which in this context are not. *See* discussion *infra*. In passing, however, we also disagree with the Union's suggestion (brief at 19-20) that *Allis-Chalmers* holds that the relationships created by a collective-bargaining agreement must be defined only under §301. They are also defined in the federal system both by unfair-labor-practice proceedings, *see, e.g., NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984), and by fair-

(Continued on following page)

unless, in such a state suit, "there may be embedded circumstances that could constitute an unfair labor practice" cognizable by the NLRB, *International Association of Machinists v. Gonzales*, 356 U.S. 617, 619 (1957), thus implicating the *Garmon* pre-emption doctrine,[23] there is no reason "to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership . . . ."[24]

Footnote continued—

representation proceedings, *see, e.g., DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983); and in the state system by all of the state statutes and causes of actions which are not pre-empted. *See, e.g., Metropolitan Life Ins. Co. v. Commonwealth of Massachusetts*, 471 U.S. ..... , 105 S. Ct. 2380, 85 L. Ed.2d 728 (1985); *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977); *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966). Moreover, this assertion by the Union directly contradicts its later contention (brief at 27) that union/worker relations are defined solely by the duty of fair representation. Both contentions are wrong.

23. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). *See Local No. 207, International Association of Bridge Workers v. Perko*, 373 U.S. 701, 707-08 (1963); *Local 100 of the United Association of Journeymen v. Borden*, 373 U.S. 690, 696-98 (1963).

24. *International Association of Machinists v. Gonzales*, 356 U.S. at 620. *Accord, NLRB v. Boeing Co.*, 412 U.S. 67, 75-76 (1973) ("the local law of contracts or voluntary associations usually governs the enforcement of this relationship"); *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 300-01 (1971) ("The legislative determination that courts are fully competent to resolve labor relations disputes through focusing on the terms of a collective-bargaining agreement cannot be said to sweep within it the same conclusion with regard to the terms of union-employee contracts that are said to be implied in law. That is why the principle of Smith v. Evening News is applicable only to those disputes that are governed by the terms of the collective-bargaining agreement itself"); *Scofield v. NLRB*, 394 U.S. 423, 426 n.3 (1969) ("Unless the rule or its enforcement impinges on some policy of the federal labor law, the regulation of the relationship between union and employee is a contractual matter governed by local law"). *See Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 303 n.12 (1977). *Cf. United Association of Journeymen v. Local 334*, 452 U.S. 615, 627 n.16 (1981)

(Continued on following page)

In addition, the state complaint might be based upon obligations voluntarily assumed by the Union in the course of its working relationship with its members. It may be, for example, that Union representatives traditionally undertook to advise members, and especially apprentice members, of the dangers inherent in certain job assignments. It may have been customary for Union representatives to provide or encourage informal on-the-job training to apprentices receiving new assignments. It may be that Union representatives performed the function of screening job assignments for the Company, independently of any contractual duty to do so, and that the Company relied upon their advice on such matters. Or it may be that absent such an arrangement, the Union had undertaken to screen the Company's job assignments, and that the Company routinely acceded to any objections which it raised. Clearly under Florida law, such customary practices give rise to a duty of care.[25]

Footnote continued—

(Court need not decide under what circumstances, if any, such actions may be brought under §301). The above-cited cases reflect the recognition that §301 is designed principally to enforce collective-bargaining agreements, *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 509 (1962), and thus governs "agreement[s] between employers and labor organizations significant to the maintenance of labor peace between them." *Retail Clerks International Association v. Lion Dry Goods, Inc.*, 369 U.S. 17, 28 (1962). *See, e.g., International Union, United Automobile Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 700 (1966) (§301 does cover union's suit against employer for breach of individual contracts with union members). As the above-referenced cases suggest, however, to borrow the Court's language from another context, in most cases an action based on the relationship between an employee and his union is "too attenuated" to invoke §301. *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27 n.32 (1983).

25. *See Banfield v. Addington*, 104 Fla. 661, 140 So. 893 (1932); *Whitehead v. Rizon East Association*, 425 So.2d 627, 629-30 (Fla. 4th DCA 1983); *Fidelity & Casualty Co. v. L.F.E. Corp.*, 382 So.2d 363 (Fla. 2nd DCA 1980).

As a third alternative, Hechler might prove that Union representatives committed some positive act of negligence in connection with her job assignment, like recommending her for the job, or negligently misrepresenting her abilities. Of course, Florida would recognize the Union's responsibility for "positive acts of negligence which arose out of, but were not dependent upon, contractual, or attempted contractual relationships."[26]

Under all three theories, the Union would be responsible for its representatives' negligent performance or nonperformance of "an independent, non-negotiable state imposed duty which does not create . . . problems of contract interpretation . . . ." *Allis-Chalmers,* 85 L. Ed.2d at 219 n. 11. The Union cannot, therefore, sustain its heavy burden of demonstrating that Sally Hechler's state-law complaint must necessarily be based upon an interpretation of its collective-bargaining agreement with the Company.

The Union might argue, however, that if the contract is not inherent in the plaintiff's case, it might well play a part in the Union's defense. One possibility is a defense of comparative negligence,[27] based on Hechler's right to decline an unsafe assignment under the collective-bargain-

---

26. *Banfield v. Addington,* 104 Fla. 661, 140 So. 893, 897 (1932). In this context, the Union's duty would be defined "by the scope of the anticipated risks to which the defendant exposes others." *Crislip v. Holland,* 401 So.2d 1115, 1117 (Fla. 4th DCA), *review denied,* 411 So.2d 380 (Fla. 1981). *See Vining v. Avis Rent-A-Car System, Inc.,* 354 So.2d 54 (Fla. 1978) (per curiam). It should be emphasized that none of our three theories make any assumptions about the **Company's** duties under the collective-bargaining agreement, which might require resort to that agreement. To the contrary, they suggest only that the Union could have helped Hechler deal with or avoid her assignment, or could have dealt with the Company through practices developed outside of formal contractual requirements.

27. *See Hoffman v. Jones,* 280 So.2d 431 (Fla. 1973) (adopting defense of comparative negligence in Florida).

ing agreement, and to protest it through grievance procedures. In some other case, involving a collective-bargaining agreement which does not unambiguously create such a right, this prospect would be troublesome, because the union's defense might require resort to the contract. As we have noted, however, the pre-emption doctrine is not concerned with "theoretical disputes but with concrete and specific issues raised by actual cases." *Allen-Bradley Local No. 1111, United Electrical Workers v. Winsconsin Employment Relations Board*, 315 U.S. 740, 746 (1942).[28] In the instant case, Hechler would have no choice but to concede that the agreement gave her such a right, and to suffer any assignment of comparative fault which might attach to her failure to exercise it. There would be no occasion to interpret the collective-bargaining agreement.

The Union might also invoke the agreement as a defense on the question of duty, contending that it positively relieves the Union of any obligation to protect a member's safety in the workplace. At the threshold, however, any such contention would appear inconsistent with the Union's repeated declaration (*e.g.*, brief at 2, 22) that the collective-bargaining agreement does not address its own obligations regarding safety, but only the Company's. Surely the Union would be estopped to take a contrary

---

28. As the Court has stated in the removal context, the case must involve an actual "dispute or controversy respecting the validity, construction or effect of [a federal] law, upon the determination of which the result depends." *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912), *quoted in Gully v. First National Bank*, 299 U.S. 109, 114 (1936). *Gully* distinguishes "between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by." 299 U.S. at 118, *quoted in Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. ....., 106 S. Ct. 3229, 3235 n.11, 92 L. Ed.2d 650, 661-62 n.11 (1986).

position upon remand.[29] Moreover, the Union cannot claim that the collective-bargaining agreement **facially** exculpates it from any liabilities to third parties other than those contained or implied in the agreement itself, and thus its defense would fail under the law of Florida, which requires such disclaimers to be explicit, because an "exculpatory clause [is] looked on with disfavor."[30] Moreover, it seems to us inconceivable that Florida or any other jurisdiction would enforce a contract clause exculpating one of the parties from any liability to a **third party** growing out of duties which exist **independent** of the contract. We acknowledge that a third-party beneficiary of a contract who seeks to enforce it may be subject to any defenses which the contract prescribes. But as we have demonstrated, Sally Hechler's claim may well derive from duties independent of the contract, and in pursuing such claims, it is inconceivable that she would be bound by defenses asserted to be implicit in a document to which she is not a party, and upon which she does not rely.[31]

---

29. *See generally Hodkin v. Perry*, 88 So.2d 139, 140 (Fla. 1956); *O'Bryan v. Linton*, 41 So.2d 169, 171 (Fla. 1949); *Salcedo v. Associacion Cubana, Inc.*, 368 So.2d 1337, 1339 (Fla. 3rd DCA), *cert. denied*, 378 So.2d 342 (Fla. 1979).

30. *Van Tuyn v. Zurich American Ins. Co.*, 447 So.2d 318, 320 (Fla. 4th DCA 1984). *See Florida Power & Light Co. v. Mid-Valley, Inc.*, 763 F.2d 1316, 1318 (11th Cir. 1985) (Florida law) (defense of contractual disclaimer requires "an express reference"). *Accord, Van Tuyn v. Zurich American Ins. Co.*, 447 So.2d at 320; *Goyings v. Eckerd Foundation*, 403 So.2d 1144, 1146 (Fla. 2nd DCA 1981). This is a matter of Florida's "public policy." *Charles Poe Masonry v. Spring Lock Scaffolding Co.*, 374 So.2d 487, 489 (Fla. 1979).

31. *See Glades County, Fla. v. Detroit Fidelity & Surety Co.*, 57 F.2d 449, 451 (5th Cir. 1932) (Florida law) (surety of contract between county and general contractor not relieved of duty to pay materialmen and laborers by virtue of county's breach, because surety also undertook obligations running directly to materialmen and laborers). *See also International*

(Continued on following page)

In citing Florida law on the propriety of this potential defense, we are not begging the question of whether its theoretical availability creates a federal issue requiring pre-emption of the state claim. As the Court stressed in *Allis-Chalmers*, 85 L. Ed.2d at 215-16, §301 does not "give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. . . . [It] does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. . . . [I]t would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." A state rule limiting exculpatory contractual language does not purport "to define the meaning of the contract relationship," *id.* at 216-17, but to enforce a public policy. *See* note 30, *supra*.

In light of the foregoing, it is evident that Sally Hechler's complaint raises claims which may be litigated free of any need to interpret the collective-bargaining agreement. For this reason, the Union cannot sustain its burden, even assuming *arguendo* that the case was properly removed to federal court, of proving that it necessarily

---

Footnote continued—

Brotherhood of Electrical Workers v. Dave's Electric Service, Inc., 382 F. Supp. 427, 430 (M.D. Fla. 1974) (federal law) (in §301 action, "after the contract is made and that relationship [between promisor, promisee and beneficiary] is established, the rights of the promisee and those of the beneficiary follow separate paths so that intervening defenses may be good against one but not against the other"). *See generally* 4 *Corbin on Contracts* §818, at 274, 276 (1951). In addition, such a broad exculpatory defense might run afoul of §101(a)(4) of the Landrum-Griffin Act, 29 U.S.C. §411(a)(4), providing that "[n]o labor organization shall limit the right of any member thereof to institute an action in any court . . . ." *See Clayton v. International Union, United Automobile Workers*, 451 U.S. 679, 687-88 & n.3 (1981).

embraces issues governed by §301, and thus may be pre-empted.[32]

B. Even if Hechler's Complaint Raised Issues Cognizable Only Under §301, the State Court is Capable of Enforcing Federal Law on Those Issues. Even if Hechler's state claim were based solely upon relationships cognizable under §301, there is no reason to assume that the Florida courts would disobey the command of the supremacy clause

---

32. This is not to concede that the case was properly removed under the "complete pre-emption" doctrine of *Avco Corp. v. Arrow Lodge No. 735, International Association of Machinists,* 390 U.S. 557 (1968), in which the state action was explicitly based upon the collective-bargaining agreement. *Avco* holds only that "a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint," and that "if a federal cause of action completely preempts a state cause of action, any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust,* 463 U.S. 1, 22-24 (1983). In this sense, the threshold propriety of removal is dependent upon the substantive propriety of pre-emption. *See Merrell Dow Pharmaceuticals Inc v. Thompson,* 478 U.S. ....., 106 S. Ct. 3229, 3232, 92 L. Ed.2d 650, 658 (1986) (question is whether well-pleaded complaint necessarily arises under federal law); *Franchise Tax,* 463 U.S. at 10 (same); *Taylor v. Anderson,* 234 U.S. 74, 75-76 (1914) (same). Because, as we have demonstrated, Hechler's state claim might be prosecuted free of any need to interpret the collective-bargaining agreement, her complaint was not simply an artful attempt to disguise a necessarily-federal claim. *See Pan American Petroleum Corp. v. Superior Court of the State of Delaware,* 366 U.S. 656, 663 (1961) ("The rights as asserted . . . are traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation . . ."). At best, therefore, the federal scheme arises in a defensive posture at the Union's instance, which is insufficient to warrant removal. *See Merrell Dow Pharmaceuticals Inc. v. Thompson, supra,* 92 L. Ed.2d at 658, *citing Louisville & Nashville R. Co. v. Mottley,* 211 U.S. 149 (1908); *Franchise Tax,* 463 U.S. at 25. And as we have noted, note 28, *supra,* if there is any chance that Hechler's claim may be based on non-federal questions, then removal was inappropriate, because removal is based on disputes that are necessary—not merely possible. This suggests an independent reason for affirming the court of appeals' decision—that the case was not removable in the first place.

and apply state law instead. By the very nature of our federal system, the opposite assumption is appropriate: "When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of [a state] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state."[33] As the Court noted in *Allen-Bradley Local No. 1111, United Electrical Workers v. Wisconsin Employment Relations Board*, 315 U.S. 740, 746, 750 (1942): "Nor will we assume in advance that a State will so construe its law as to bring it into conflict with the federal Constitution or an act of Congress. . . . It is not sufficient . . . to show that the state Act *might* be so construed and applied as to dilute, impair, or defeat those rights."[34]

---

33. *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 57 (1912). *Accord, Testa v. Katt*, 330 U.S. 386, 392, 393 (1947) ("[T]he policy of the federal Act is the prevailing policy in every state"); *Clafin v. Houseman*, 93 U.S. 130, 137 (1876) (the state and federal laws "together form one system of jurisprudence, which constitutes the law of the land for the State").

34. *Accord, Ohio Civil Rights Commission v. Dayton Christian Schools*, 54 U.S.L.W. 4860, 4863 (U.S. June 27, 1986) ("[I]t would seem an unusual doctrine, and one not supported by the cited case, to say that the [state] Commission could not construe its own statutory mandate in the light of federal constitutional principles"); *Juidice v. Vail*, 430 U.S. 327, 336 (1977) (refusal to abstain would reflect negatively upon the state court's ability to enforce constitutional principles); *Hoffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975) ("Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do"); *Bellotti v. Baird*, 428 U.S. 132, 148 n.16 (1976) ("We assume that the Supreme Judicial Court [of Massachusetts] will do everything in its power to interpret the [state] Act in conformity with its title: 'An Act to protect . . . within present constitutional limits' "); *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 512 (1900) ("Congress . . . evidently proceeded upon the supposition (which is a rightful one) that, as by express terms of the constitution, no courts, national or state, would decline to carry into effect the acts of Congress").

In a variety of contexts, the state courts are also trusted to interpret federal law correctly, subject only to the ultimate review of this Court.[35] This deference is reflected in rules requiring the exhaustion of state remedies as a predicate to the collateral assertion of federal rights in federal court;[36] and in rules requiring the presentation of federal issues in state court before their consideration by this Court.[37] It is reflected in the variety of ways in which the states integrate federal law into the prosecution of state-created rights—for example, in the enforcement of state causes of action incorporating duties prescribed by federal statutes;[38] in the availability of federal law as a defense in state actions;[39] in the impermis-

---

35. *See Merrell Dow Pharmaceuticals Inc. v. Thompson*, *supra* note 32, 92 L. Ed.2d at 663; *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 12 n.12 (1983); *Moore v. Chesapeake & Ohio R. Co.*, 291 U.S. 205, 214-15 (1934); *Murdock v. City of Memphis*, 20 Wall. 590 (U.S. 1874).

36. *See Francis v. Henderson*, 425 U.S. 536, 542 (1976); *Picard v. Connor*, 404 U.S. 270, 275 (1971) (exhaustion requirement based on "federal-state comity"), *quoted in Webb v. Webb*, 451 U.S. 493, 500 (1981); *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971).

37. *See Webb v. Webb*, 451 U.S. 493, 499 (1981).

38. *See, e.g., Moore v. Chesapeake & Ohio R. Co.*, 291 U.S. 205, 216 (1934) ("Nothing in the [federal act] precluded the state from incorporating in its legislation applicable to local transportation the paramount duty which the [federal act] imposed"); *Louisville & Nashville R. Co. v. Western Union Telegraph Co.*, 237 U.S. 300, 303 (1915) ("The suit is not maintained by virtue of the act of Congress, but by virtue of the Louisiana statute that allows itself to be satisfied by that act"). As we have noted, the state action in *Lucas Flower*, 369 U.S. 95, is also an example, because the state judgment was affirmed by this Court despite its declaration that the state court should have applied federal law on the question of liability, since the outcome was consistent with federal law.

39. *See, e.g., United States v. Equitable Life Assurance Society*, 384 U.S. 323, 330-31 (1966) (priority of federal tax

(Continued on following page)

sibility of certain state-created defenses in conflict with federal law;[40] and in the limitation of certain state-created remedies by inconsistent federal law.[41]

Such confidence is also shown in the common Congressional delegation to the states of concurrent authority to enforce federal statutes.[42] Indeed, although Congress

---

Footnote continued—

lien in New Jersey foreclosure proceeding determined by federal law); *Free v. Bland*, 369 U.S. 663, 669-71 (1962) (state probate disposition of U.S. savings bond determined by federal regulations; remand to state court with instructions to enforce them); *Kelly v. Kosuga*, 358 U.S. 516, 519 (1959) (in state contract action, "state law governs in general the rights and duties of sellers and purchasers of goods, and . . . the effect of illegality under a federal statute is a matter of federal law"); *United States v. City of New Britain, Connecticut*, 347 U.S. 81, 84 (1954) (in state mortgage foreclosure proceeding, state ruling on perfectability of city lien not binding against federal government); *United States v. Waddill, Holland & Flinn*, 323 U.S. 353, 356-57 (1945) (state rules regarding priority of liens give way to inconsistent federal statute). *Cf. Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963) (in diversity libel suit, "federal officials are usually governed by local law. . . . Federal law, however, supplies the defense, if the conduct complained of was done pursuant to a federally imposed duty . . . or immunity from suit"); *Howard v. Lyons*, 360 U.S. 593, 597 (1959) (same).

40. *See Ferri v. Ackerman*, 444 U.S. 193, 198 (1979) ("[W]hen state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law"); *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176 (1942) (in diversity case charging price-fixing under state law, defendant not estopped to claim invalidity of the underlying patent despite plaintiff's satisfaction of criteria for estoppel avoidance under state law, because the assertion of such an estoppel avoidance would undermine federal rules concerning patents).

41. *See, e.g., Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 327 (1938) (in diversity case, power to award injunctive relief controlled by applicable federal statute).

42. *See, e.g., Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962) ("Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court

(Continued on following page)

has the power to confer exclusive jurisdiction over federal causes of action in federal courts,[43] it has chosen to confer concurrent jurisdiction over §301 actions.[44] As the Court noted in *Charles Dowd Box Co. v. Courtney*, 368 U.S. at 511, "the purpose of conferring jurisdiction upon the federal district courts was not to displace, but to supplement the thoroughly considered jurisdiction of the courts of the various States over contracts made by labor organizations." The Court added, *id.* at 514:

> It is implicit in the choice Congress made that "diversities and conflicts" may occur, no less among the courts of the eleven federal circuits, than among the courts of the several States, as there evolves in this field of labor management relations that body of federal common law of which Lincoln Mills spoke. But this not necessarily unhealthy prospect is no more

---

Footnote continued—

jurisdiction over cases arising under federal law has been the exception rather than the rule. . . . [The Court will not] disregard this consistent history of hospitable acceptance of concurrent jurisdiction"); *Brady v. Southern Ry.*, 320 U.S. 476, 479 (1943) (in state-court action brought under federal statute, federal law controls the standard governing a motion to dismiss); *Clafin v. Houseman*, 93 U.S. 130, 137 (1876) ("If an act of Congress gives a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in state court"), *quoted in Testa v. Katt*, 330 U.S. 386, 391 (1947); *United Electrical Workers v. Westinghouse Electric Corp.*, 65 F. Supp. 420, 422 (E.D. Pa. 1946).

43. *See International Longshoremen's Association v. Davis*, 476 U.S. ....., 106 S. Ct. 1904, 90 L. Ed.2d 389, 398 (1986); *Wisconsin Department of Industry v. Gould*, ... U.S. ....., 106 S. Ct. 1057, 88 L. Ed.2d 282 (1986); *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 506 (1900); *Clafin v. Houseman*, 93 U.S. 833, 838 (1876).

44. *See Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962). *See also Allis-Chalmers*, 85 L. Ed.2d at 214 n.5; *Humphrey v. Moore*, 375 U.S. 335, 334 & n.6 (1964); *Lucas Flower*, 369 U.S. at 101-02; *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457 (1957).

than the usual consequence of the historic acceptance of concurrent state and federal jurisdiction over cases arising under federal law. To resolve and accommodate such diversities and conflicts is one of the traditional functions of this Court.

There is no argument for pre-emption of Hechler's state action, therefore, on the ground that Congress distrusted the states to adjudicate those federal questions inherent in that action. It does not follow, however, that in such cases the state is merely enforcing a federal cause of action, subject to a federal statute of limitations. As the Court noted in *Moore v. Chesapeake & Ohio R. Co.*, 291 U.S. 205, 215-16 (1933): "The [federal statute] having prescribed the duty in this fashion, the right to recover damages sustained by the injured employee through the breach of duty sprang from the principle of the common law . . . and was left to be enforced accordingly . . . ."[45]

---

45. Thus, for example, when a state statute creates a cause of action based on the violation of a federal statute, "the foundation of the right claimed is a state law, [and] the suit to assert it arises under the state law none the less that the state has attached a condition that only alien legislation can fulfill." *Louisville & Nashville R. Co. v. Western Union Telegraph Co.*, 237 U.S. 300, 303 (1915) (Holmes, J.). The Court continued: "the state law is the sole determinant of the conditions supposed, and its reference elsewhere for their fulfillment is like the reference to a document that it adopts and makes part of itself. The suit is not maintained by virtue of the act of Congress, but by virtue of the [state] statute that allows itself to be satisfied by that act." *Accord, Minneapolis, St. Paul, & S.S.M.R. Co. v. Poplar*, 237 U.S. 369, 372 (1915) ("The Federal statute, in the present case, touched the duty of the master at a single point, and, save as provided in the statute, the right of the plaintiff to recover was left to be determined by the law of the state"); *Shulthis v. McDougal*, 225 U.S. 561, 570 (1912) ("[I]t cannot be held that the case as therein stated [in the plaintiff's complaint] was one arising under the [federal] statutes mentioned"); *Claflin v. Houseman*, 93 U.S. 833, 837-38 (1876) ("The actions which lie in such cases are common law actions. . . . The assignee simply derives his title through a law of the United States"). *See Smith v. Kansas City Title & Trust*

(Continued on following page)

And this is true even if the action is removable to federal court under 28 U.S.C. §1441(b), because of the federal question which it embraces. Contrary to the Union's assertion (brief at 6 n.2), there is a serious question whether Hechler's action was removable, even if it must be construed necessarily to depend in part upon federal questions.[46] But

---

Footnote continued—

Co., 225 U.S. 180, 214 (1920) (Holmes, J., dissenting) ("It is evident that the cause of action arises not under any law of the United States but wholly under Missouri law. . . . [T]he scope of their duty depends upon the character of their corporation and other laws of Missouri. . . . The whole foundation of the duty is Missouri law, which at its sole will incorporated the law as it might incorporate a document. The other law or document depends for its relevance and effect not on its own force but upon the law that took it up"). We also refer the Court to the wide range of cases already mentioned, in which a state-created action may depend upon or defer to federal law in some particular aspect, but is governed by state law in all other respects.

46. *See Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. ___, 106 S. Ct. 3229, 92 L. Ed.2d 650 (1986); *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983); *Gully v. First National Bank in Meridian*, 299 U.S. 109 (1936); *Moore v. Chesapeake & Ohio R. Co.*, 291 U.S. 205 (1934). *Compare Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). In *Merrell Dow*, 92 L. Ed.2d at 662 n.12, the Court distinguished *Smith* on the ground that the federal issue in question "was the constitutionality of an important federal statute." The Court continued: "In *Moore*, in contrast, the Court emphasized that the violation of the federal standard as an element of state tort recovery did not fundamentally change the state tort nature of the action." The same could be said of the instant case, and at the very least, the answer depends on "the dictates of sound judicial policy"—not on simple formulas. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 (1959). Notwithstanding its presumptive incorporation of a single federal question, Hechler's claim in large measure is "left to be determined by the law of the state." *Minneapolis, St. Paul & S.S.M.R. Co. v. Poplar*, 237 U.S. 369, 372 (1915). And in contrast to *Merrell Dow*, in which no analogous federal claim was available to the plaintiff, *see* 92 L. Ed.2d at 664, this is true even if Hechler pursued her state action notwithstanding an available federal remedy under §301, so long as the federal remedy does not

(Continued on following page)

even if the state action was removable because it embraces an important federal question, that does not mean that all of the theretofore-state issues—like the amount of damages or the statute of limitations—are suddenly converted into federal questions, which must find their source in some elusive concept of federal common law. To the contrary, where a case is properly removed to federal court, its "jurisdiction extend[s] to the determination of all questions, including questions of state law . . . ."[47]

The instant case, therefore, is fundamentally different from *Allis-Chalmers*—even if it necessarily embraces questions cognizable under §301—because the state court can be expected to apply federal law on those questions. And as the foregoing discussion makes clear, there is nothing inherently impermissible in a state's adoption of federal questions in the enforcement of its own laws: "[I]t is neither new nor unusual in judicial proceedings to apply different rules of law to different situations and subjects, even though possessing some elements of similarity . . . ."[48] To the contrary, "state law may furnish convenient

---

Footnote continued—

pre-empt even those state claims incorporating federal law—a question we discuss next. We think the court of appeals should have an opportunity to address this difficult question of removal, should this Court determine that Hechler's state claim is permissible in an appropriate forum. If that turns out to be federal court, so be it.

47. *Lincoln Gas & Electric Light Co. v. Lincoln*, 250 U.S. 256, 264 (1919). *Accord, Hurn v. Oursler*, 289 U.S. 238, 242-44 (1933); *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175, 191 (1909).

48. *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 58 (1912). *Accord, Allen-Bradley Local No. 1111, United Electrical Workers v. Wisconsin Employment Relations Board*, 315 U.S. 740, 751 (1942) ("Since the state system of regulation, as construed and applied here, can be reconciled with the federal Act

(Continued on following page)

solutions in no way inconsistent with adequate protection of the federal interest. And the answer to be given necessarily is dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law."[49] In this sense, federal law "is interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of the purposes of the federal act." *Metropolitan Life Ins. Co. v. Commonwealth of Massachusetts*, 471 U.S. ....., 105 S. Ct. 2380, 85 L. Ed.2d 728, 751 (1985).

In *Allis-Chalmers*, the state action was pre-empted not because the state court was incapable upon remand of applying federal law in an "interstitial" way, "supplementing state law here compatible," but because the very existence of the state action—even if based on federal law—would "prevent[] the accomplishment of the purposes of the federal act," by shortcutting grievance and arbitration procedures. It was not the presence of a federal question

---

Footnote continued—

and since the two as focused in this case can consistently stand together, the order of the state Board must be sustained"); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938) (state and federal statutes harmonious). *Cf. Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 (1962) ("We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law").

49. *United States & Standard Oil Co. of California*, 332 U.S. 301, 310 (1947). *See International Association of Machinists v. Gonzales*, 356 U.S. 617, 619 (1958) ("The statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation"). Thus, the court will not presume that Congress intended pre-emption, but will examine the facts of each case. *See Allen-Bradley Local No. 1111, United Electrical Workers v. Wisconsin Employment Relations Board*, 315 U.S. 740, 749 (1942). *Cf. Metropolitan Life Ins. Co. v. Commonwealth of Massachusetts*, 471 U.S. ....., 105 S. Ct. 2380, 85 L. Ed.2d 728, 749 (1985).

which required pre-emption, but the impermissibility of a state action incorporating that question. As we demonstrate next, there is no similar warrant for pre-emption in this case.

C. The Prosecution of Hechler's State-Law Complaint Will Not Interfere With the Federal Scheme. First, permitting Hechler's action would not deter the use of the pre-injury dispute-resolution procedures available under federal law. If Sally Hechler had appreciated the deadly peril of her assignment, as a mere apprentice, to the surreal chambers of an electrical substation (J.A. 4-5), and if she had studied her collective-bargaining agreement, and if she were willing to risk the ire of her employer, and the ridicule of her fellow employees, she might have refused the job and exercised a variety of options under the collective-bargaining agreement, perhaps culminating in binding arbitration.[50] And if the Union had refused to arbitrate the matter, or had failed to fairly represent Hechler in any arbitration proceeding, she might have sought additional relief in a hybrid §301/unfair-representation claim in federal court—charging that the Union had not ade-

---

50. In many ways, the agreement acknowledges the need for special treatment of apprentices (*see* J.A. 8, 10, 13-18). It prohibits the Company from assigning an apprentice to work near energized conductors carrying more than 500 volts (J.A. 17-18). It provides that as a general matter, an employee is not permitted to stop working on account of a grievance (J.A. 13), but that this prohibition does not apply to safety questions, and that "no employee shall be allowed or required to take any undue risk in the performance of his duties which he or his Foreman or Supervisor consider unsafe to himself or to his fellow workers" (J.A. 14). And the contract establishes an elaborate grievance procedure, initiated at the lower stages by the employee, and eventually resulting in binding arbitration if the Union requests it (J.A. 11-13). Absent such a requirement of binding arbitration, Hechler could have sought to enjoin the assignment in a §301-action against the Company. *See Vaca v. Sipes*, 386 U.S. 171, 184 n.9 (1967); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 657-58 (1965).

quately represented her in prosecuting what would have been a meritorious contract claim against the employer.[51] If, **before** her injury, Sally Hechler had forsaken these procedures, and instead had run to state court charging that the Union had acted negligently in allowing her assignment to an unsafe job, she properly would have faced dismissal of her state action as pre-empted by the federal laws.[52]

The fact is, however—for reasons which surely will be litigated below in response to the Union's charge of comparative negligence—Sally Hechler did not protest her assignment. Perhaps she was so unskilled as to be ignorant of her peril. Perhaps she was unaware of her rights under the collective-bargaining agreement. Perhaps she was afraid of ridicule from her co-workers or re-

---

51. *See DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 163-65 (1983); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 62 (1981); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71 (1976); *Vaca v. Sipes*, 386 U.S. 171, 177, 179, 183-88 (1967). The §301 action against the employer is for breach of the collective-bargaining agreement; the fair-representation claim against the union is not based on the collective-bargaining contract, but is a "statutory duty" derived from various provisions of the National Labors Relations Act, 29 U.S.C. §§151-59. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), *citing Ford Motor Co. v. Huffman*, 345 U.S. 330 (1952), *and Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944). *Accord, DelCostello v. International Brotherhood of Teamsters*, 462 U.S. at 164 & n.14; *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 47 (1978). In addition, if the employee has been fired for exercising a contractual right to refuse an unsafe job, he might also charge the employer with an unfair labor practice under §8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1). *See NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984).

52. Admittedly, this scenario is a bit difficult to envision. Before her injury, the worker has suffered no damages cognizable in tort. In contrast, the federal scheme would give her an immediate forum for protesting the assignment, and for securing review of the grievance process in federal court. Nevertheless, we agree that such an attempt to shortcut the available federal remedy would be pre-empted.

taliation by the Company.[53] Whatever the reason, she did her best at the job, and she suffered horrible injuries as a result. At that point, she had no administrative remedies under the collective-bargaining agreement. She had no grievance to file—no process to protest. And she had no unfair-representation claim against the Union, in the absence of any allegation of arbitrary or discriminatory conduct on its part. *See Vaca v. Sipes*, 386 U.S. 171, 190 (1967). At best she had a suit against the Union under §301, for whatever contract damages she suffered.[54] Thus, in marked contrast to *Allis-Chalmers*, in which the plaintiff sought to avoid an available grievance procedure by proceeding directly to state court, *see* 85 L. Ed.2d at 220-21, Hechler did not circumvent federally-sanctioned dispute-resolution mechanisms by proceeding to state court after

---

53. *Cf. Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 430-31 (1939) (no defense of assumption-of-risk in admiralty, in part because a seaman cannot be expected to refuse an unsafe assignment).

54. Although this Court has not defined the scope of damages allowable under §301, the lower courts have applied "general contract law." *International Brotherhood of Electrical Workers v. A-1 Electric Service, Inc.*, 531 F.2d 1, 3 (10th Cir.), *cert. denied*, 429 U.S. 832 (1976). That means tangible losses clearly contemplated by the parties at the time the contract was made. *See St. Clair v. Local Union No. 515 of the International Brotherhood of Teamsters*, 422 F.2d 128, 132 (6th Cir. 1969). *See generally Westinghouse Electric Corp. v. International Brotherhood of Electrical Workers*, 561 F.2d 521, 523 (4th Cir. 1977), *cert. denied*, 434 U.S. 1036 (1978); *Eazor Express, Inc. v. International Brotherhood of Teamsters*, 520 F.2d 951, 966 (3rd Cir. 1975), *cert. denied*, 424 U.S. 935 (1976); *Brotherhood of Railroad Trainmen v. Denver & R.G.W.R.*, 338 F.2d 407, 409-10 (10th Cir. 1964), *cert. denied*, 380 U.S. 972 (1965); *Lewis v. Benedict Coal Corp.*, 259 F.2d 346, 352 (6th Cir. 1958), *modified on other grounds*, 361 U.S. 459 (1960). In a case like this one, in which the relevant contract provisions specifically concern worker safety, Hechler may have an argument for contract damages. *See* p. 46, *infra*. The point here is that Hechler's post-injury action did not undermine the sanctity of available pre-injury remedies. We will discuss in a moment its compatibility with any federal post-injury remedies.

her injury. Her action did not "usurp those functions which collective-bargaining contracts have properly 'entrusted to the arbitration tribunal.' "[55]

That observation does not end the inquiry, however, because the Court must consider the implications of Hechler's position for future cases. *See Republic Steel Corp. v. Maddox*, 379 U.S. 650, 656 (1965). In other contexts, this Court repeatedly has emphasized that the mere availability of preventive federal remedies before suffering an injury does not in itself preclude a state action for redress of injuries already suffered.[56] As we have emphasized, the question is not one of theoretical possibilities, sanctioning a blanket rule, but of practical necessities. Sally Hechler's state action should be forbidden only if it is likely in some context to discourage workers from invoking their preventive remedies under federal law. To put that question, we submit, is to answer it. It is inconceivable that a worker would knowingly risk his life in a dangerous job, knowingly foresaking available preventive remedies, merely because of the assumed availability of a state tort action in the event of injury. It is particularly inconceivable because the very act of doing so—of knowingly encountering an avoidable danger—would itself be a dispositive or nearly-dispositive defense in the state action.

---

55. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562-63 (1976), *quoting United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 566 (1960). To borrow the Court's language in a slightly-different context in *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 839 (1984), if the worker risks an unsafe job rather than protesting it, the question of his appropriate pre-injury remedy "may [become] moot."

56. *See Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 742 (1983), *citing Linn v. Plant Guard Workers*, 383 U.S. 53, 63 (1966); *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 298 (1977).

Sally Hechler may have attempted this job because she did not know that she could refuse it; or because she thought she was trained enough for it; or because, a mere apprentice, she was afraid of making waves. But she certainly did not do so because she knew that if she were electrocuted she could sue the Union in state court. And yet, only on that assumption is the allowance of her state action a deterrent to the exercise of federally-sanctioned remedies. It is clear that Hechler's action does not implicate "that aspect of national labor policy that encourages private rather than judicial resolution of disputes arising over collective-bargaining agreements." *Clayton v. International Union, United Automobile Workers*, 451 U.S. 679, 689 (1981).

Second, it might be argued that although the Congress did not explicitly exempt unions from liability for the negligent performance of contractual or common-law duties to their members, it nonetheless intended that unions be free to be negligent toward individual workers in all contexts, because such freedom would better facilitate the unions' performance of their obligations to members as a group. This is the *Machinists* doctrine, under which the absence of explicit Congressional permission or prohibition of a given activity might reflect a purposeful decision to leave the activity unregulated.[57] In an

---

57. *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). *See Baker v. General Motors Corp.*, 54 U.S.L.W. 5037 (U.S. July 2, 1986); *Metropolitan Life Ins. Co. v. Commonwealth of Massachusetts*, 471 U.S. ....., 105 S. Ct. 2380, 85 L. Ed.2d 728, 746 & n.27 (1985); *Belknap, Inc. v. Hale*, 463 U.S. 491, 498-99 (1983). The *Garmon* pre-emption doctrine—which in proper cases protects the jurisdiction of the NLRB, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)—has no application here. *See Allis-Chalmers*, 85 L. Ed.2d at 217 n.9; *Vaca v. Sipes*, 386 U.S. 171, 184 (1967), *citing Smith v. Evening News Association*, 371 U.S. 195 (1962).

extended discussion (brief at 9-10, 21-27), the Union contends that because the fair-representation doctrine proscribes only arbitrary or discriminatory conduct by a union toward one of its members, *see Vaca v. Sipes*, 386 U.S. 171 (1967), the prosecution of Hechler's state action "'could undermine [the] careful accommodation' of individual and collective interests that the Court has struck in the fair representation context." Petitioners' Brief at 26, *quoting International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50 (1979) (punitive damages unavailable in fair-representation case).

But the Union does not explain what federal interest might be served by allowing unions to be negligent in the performance of common-law duties to workers which exist **independent** of the collective-bargaining agreement, and its argument therefore fails at the threshold. The Union says that Hechler's complaint necessarily implicates the fair-representation duty because "[t]he most that the Union could have done with respect to [Hechler's] assignment was grieve it under the grievance-arbitration procedures of the collective bargaining agreement" (brief at 10). On this assumption, the Union claims (*e.g.*, brief at 27) that "the federal duty of fair representation is the sole source of law for the courts to apply in judging a union's conduct in performing its functions as exclusive bargaining representative, including its function in enforcing collective bargaining agreements."[58] But the premise of this argument is false, because, as we have demonstrated, the state may recognize obligations **outside** of a union's "function in enforcing collective bargaining

---

58. As we have observed, note 22, *supra*, this assertion directly contradicts the Union's earlier contention (brief at 19-20) that the relationships created by a collective-bargaining agreement must be defined solely under §301.

agreements"—obligations running directly from the union to its members. And although it bears the burden of proof, the Union has not even attempted to explain how the state enforcement of such extrinsic obligations would "deviate from fair-representation principles and develop and apply inconsistent rules of law," which " 'could undermine [the] careful accommodation' of individual and collective interests that the Court has struck in the fair representation context" (brief at 26).[59]

In *Allen-Bradley Local No. 1111, United Electrical Workers v. Wisconsin Employment Relations Board*, 315 U.S. 740, 750-51 (1942), the state was permitted to regulate the union's "mass picketing, threats, violence, and the other devices which were here employed [to intimidate other workers] . . . , notwithstanding the Union's claim that the state was interfering with the delicate labor/management balance protected by the federal labor

---

59. The only authority offered by the union—*Vaca v. Sipes*, 386 U.S. 171 (1967)—serves only to up-end the strawman which the Union has erected, because it forbade a state-law action in which the employee directly challenged the manner in which the union had represented him in grievance procedures. It was not, as here, based on duties which might exist **outside** of the grievance process. As applied to obligations existing independent of the collective-bargaining agreement, the Union's argument would invoke *Machinists* to abolish the *Garmon* doctrine, *see* note 57, *supra*, in all actions brought by members against their unions, on the theory that no balancing of interests under *Garmon* is appropriate in light of Congress' intention to define the worker/union relationship solely according to the duty of fair representation. It thus would overrule *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977), in which *Garmon* did not prevent the worker's state action against his union for discrimination in job-referrals and personal harassment, allegedly because of dissident intra-union activity. It would also overrule the line of cases cited earlier, at note 24, in which the Court permitted state contract actions based on the direct relationship between union and member. Clearly the Union cannot defend its broad assertion that the duty of fair representation is the exclusive rubric under which to judge all aspects of the worker/union relationship.

laws. The state law was permissible because it governed conduct **outside** the parameters of federal regulation, and because its prosecution posed no risk to interests maintained within those parameters: "[W]e fail to see how the [state proscription] impairs, dilutes, qualifies or in any respect subtracts from any of the rights guaranteed and protected by the federal Act. Nor is the freedom to engage in such conduct shown to be so essential or intimately related to a realization of the guarantees of the federal Act that its denial is an impairment of the federal policy." As in *Allen-Bradley*, "we fail to see" how the Union's transgression of pre-grievance obligations existing independent of the collective-bargaining agreement could upset the "delicate balance" maintained in the federal system after grievance procedures have been invoked.[60]

The same conclusion would be appropriate even if Hechler's complaint were based solely on the collective-bargaining agreement, invoking federal §301-law in that context. Even when the state action does concern the union's "function in enforcing collective bargaining agreements," the Union is flatly wrong in declaring (brief at 27) that "the federal duty of fair representation is the sole source of law for the courts to apply in judging [its] conduct . . . ." There is also the collective-bargaining agreement, and as the Union acknowledges (brief at 24), the duty of fair representation derives not from the agree-

---

60. *See generally Belknap, Inc. v. Hale*, 463 U.S. 491 (1983) (*Machinists* doctrine did not pre-empt state claims by strike replacements against employer for misrepresentation and breach of contract); *Sears, Roebuck and Co. v. San Diego County District Brotherhood of Carpenters*, 436 U.S. 180, 199 n.30 (1978) (*Machinists* no barrier to state trespass action against union); *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977) (*Machinists* no barrier to state action for defamation or violent tortious activity).

ment, but from the federal statutory scheme. *See* note 51, *supra*. Especially when the collective-bargaining agreement does not call for binding arbitration,[61] it is both permissible and conceivable that in proper cases the employee may have a contract claim against the union which also implicates its duty of fair representation. In an analogous context, the Court has held that "[t]he authority of the [NLRB] to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by §301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under §301."[62] As the Court said in *Alexander v. Gardner-Denver Co., supra* note 62, 415 U.S. at 52: "Both rights have legally independent origins and are equally available to the aggrieved employee." The same can be said of the employee's right to proceed against the union either in contract or under the fair-representation theory. The Union is plainly wrong, therefore, to suggest that the fair-representation duty is the only federally-sanctioned means of reviewing "its function in enforcing collective bargaining agreements."

The question, then, is whether the enforcement of duties derived from contract, framed under federal law, in a state tort action, somehow represents a greater threat to the "careful accommodation" effected by the fair-representation doctrine than would enforcement of the same duties under §301. The short answer is that the Union has foresaken its burden of arguing the point. There is no reason

---

61. *See Vaca v. Sipes*, 386 U.S. 171, 184 n.9 (1967); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 657-58 (1965).

62. *Smith v. Evening News Association*, 371 U.S. 195, 197 (1962). *See DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 170 (1983); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 50, 52 (1974); *Vaca v. Sipes*, 386 U.S. 171, 179-80 (1967).

why a straight §301-contract action against a union causes any less interference with the fair-representation doctrine than would a proceeding embracing identical federal questions in the context of an independent state cause of action.

We offer by analogy the much-tougher case (because it upheld, against the *Machinists* theory, a state statute requiring minimum mental-health-care benefits in employee health-care plans, a matter of state law) of *Metropolitan Life Insurance Co. v. Commonwealth of Massachusetts*, 471 U.S. ....., 105 S. Ct. 2380, 85 L. Ed.2d 728, 749-51 (1985):

> No incompatibility exists . . . between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA.
>
> * * *
>
> Unlike the NLRA, mandated-benefit laws are not laws designed to encourage or discourage employees in the promotion of their interests collectively; rather, they are in part "designed to give specific minimum protections to *individual* workers and to ensure that each employee covered by the Act would receive" the mandated health care insurance coverage. Barrentine [*v. Arkansas-Best Freight System, Inc.*, 415 U.S. 728, 739]. Nor do these laws even inadvertently affect these interests implicated in the NLRA. Rather, they are minimum standards "independent of the collective-bargaining process [that] devolve on [employees] as individual workers, not as members of a collective organization." *Id* at 745 . . . .[63]

---

63. We ask the Court to contrast this passage with the Union's indignant declaration (brief at 24-25 n.11) that individual worker rights are indeed central concerns of the labor laws.

> It would further few of the purposes of the Act to allow unions and employers to bargain for terms of employment that state law forbids employers to establish unilaterally. "Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored." [*Allis-Chalmers*, 85 L. Ed.2d at 216].
>
> * * *
>
> The States traditionally have had great latitude under their police power to legislate as " 'to the protection of the lives, limbs, health, comfort, and quiet of all persons.' " . . . "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples."
>
> * * *
>
> Federal labor law in this sense is interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of the purposes of the federal act. . . . When a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act.

In the instant case, no incompatibility exists between federal rules designed to protect the product of equal bargaining power—the collective-bargaining agreement—by enforcing that product in contract, and state rules which protect against the negligent performance of those same contractual obligations, defined under the same set of federal standards. As the Court noted in *United States v. Standard Oil Co. of California*, 332 U.S. 301, 310 (1947), the state system "furnish[es] convenient solutions in no way inconsistent with adequate protection of the federal interest."

Despite its repeated invocation of the delicate balances effected by the federal labor laws, the Union has yet to explain specifically how those balances might conceivably be unsettled by Sally Hechler's prosecution of her state action.[64] To the contrary, as we await the last brief to be filed in the court of last resort, the Union's position continues to depend upon theoretical possibilities—that Hechler's state complaint can only be based upon the collective-bargaining contract; that the state court will defy the supremacy clause and apply state law even to issues cognizable only under §301; and that for some unspecified reason, the federal labor scheme would be undermined by the prosecution of her claim. As we have emphasized repeatedly, neither the burdens attending a motion to dismiss, nor the important values of federalism, nor the specific criteria for pre-emption, will permit such speculation. The opinion of the court of appeals should be affirmed.

II. Even If Hechler Is Limited to a Contract Action Under §301, Her Complaint Was Timely Filed, and Therefore the District Court Erred in Dismissing It.

As the Union acknowledges (brief at 21), even if a state claim is impermissible under *Allis-Chalmers*, it "must either be treated as a §301 claim . . . or dismissed as pre-empted by federal labor-contract law." 85 L. Ed.2d at 221. On that assumption, the Union acknowledges (brief at 21), "[t]his case must therefore either be remanded to [the court of appeals] to decide, *applying federal law principles*, whether the case was properly dismissed by

---

64. Of course, the mere financial threat of a money judgment is not enough. *See Bowen v. United States Postal Service*, 459 U.S. 212, 227 (1983).

the district court or, alternatively, this Court must decide that issue" (emphasis in original). The only reason for the district court's dismissal (Pet. App. 1a-5a) was that Hechler's complaint was time-barred under the statute of limitations prescribed in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). The Union contends that this Court should order the affirmance of that ruling, even though the court of appeals has not yet addressed the question. We think that the court of appeals should have that opportunity, and that the district court was wrong.

DelCostello was a §301 action against the employer coupled with a fair-representation claim against the union, which followed an arbitration award for the employer. In the absence of a §301 statute of limitations, this Court's task was to " 'borrow' the most suitable statute or other rule of timeliness from some other source." *Id.* at 158. The Court distinguished its earlier decision in *International Union, United Automobile Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966)—applying the state's 6-year statute governing actions brought on unwritten contracts—because that case "was a straightforward suit under §301 . . . for breach of a collective-bargaining agreement by an employer," which "did not involve any agreement to submit disputes to arbitration . . . ." *DelCostello*, 462 U.S. at 162. The *DelCostello* case, in contrast, was "not a straightforward breach-of-contract suit under §301, as was *Hoosier*, but a hybrid §301/fair representation claim," representing a challenge to the private dispute-resolution system prescribed by the collective-bargaining agreement and endorsed by the labor laws. *Id.* at 165. For that reason, "unlike the claim in Hoosier, [the *DelCostello* claim] has no close analogy in ordinary state law." *Id.* Thus the Court borrowed the six-month limitation period prescribed

by §10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), within which to charge unfair labor practices to the NLRB. *Id.* at 169. In the process, the Court stressed "that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere. We do not mean to suggest that federal courts should eschew use of state limitations periods any time state law fails to provide a perfect analogy." *Id.* at 171. To the contrary, "resort to state law remains the norm for borrowing of limitations periods." *Id.* Only "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law." *Id.* at 172.

If the Union is correct that Hechler's sole remedy is a §301 claim against it for breach of contract, then *Hoosier Cardinal* is obviously a far closer analogy than *DelCostello.* Such a claim is not, as in *DelCostello,* 462 U.S. at 165, a challenge to a process of labor-dispute resolution—indeed, Hechler had neither the obligation nor the right to grieve or arbitrate the Union's performance of its obligations under the collective-bargaining agreement—but instead would be "a straightforward breach-of-contract suit under §301, as was Hoosier . . . ."[65] It therefore was timely under Florida's five-year statute of limitations for actions founded on a written contract, §95.11(2)(b), Fla. Stat. (1985), or

---

65. *DelCostello,* 462 U.S. at 165. *See International Union of Elevator Constructors v. Home Elevator Co.,* 55 U.S.L.W. 2129 (7th Cir. August 12, 1986); *Daigle v. Gulf State Utilities Co.,* 794 F.2d 974, 977 (5th Cir. 1986).

perhaps under its four-year statute for actions charging negligence, §95.11(3)(a).

In making this point, we are not seeking a merely-pyrrhic victory, in light of the possibility that the contract remedies available under §301 will not encompass Hechler's personal injuries, since they depend on proof that such damages were reasonably contemplated by the parties at the time the contract was made. *See* note 54, *supra*. In cases in which a contract provision is executed in contemplation of some risk of personal injury, the damages for its breach may encompass the compensation of personal injuries.[66] Moreover, this Court has counseled that "§301 is not to be given a narrow reading," *Smith v. Evening News Association*, 371 U.S. 195, 199 (1962), and that "[t]he range of judicial inventiveness will be determined by the nature of the problem." *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 457 (1957). We think a persuasive argument can be made that contract terms which expressly address the safety of workers and their workplace were made in contemplation of the possibility of personal injury.[67] And since none of the argu-

---

66. *See Corbin on Contracts* §§1017-1019, at 109-24 (1951); 11 *Williston on Contracts* §1341, at 214-23 (3rd ed. 1968). *See, e.g., Holbrook v. City of Sarasota*, 58 So.2d 862 (Fla. 1952) (allowing damages for personal injuries caused by breach of contract for medical care); *Doyle v. City of Coral Gables*, 159 Fla. 802, 33 So.2d 41 (1947) (allowing damages for personal injuries caused by breach of contract between city and bus passenger); *Butts v. County of Dade*, 178 So.2d 592 (Fla. 3rd DCA 1965) (same).

67. In *Avco Corp. v. Aero Lodge No. 735, International Association of Machinists*, 390 U.S. 557, 561 (1968), the Court "reserve[d] decision" on the court of appeals' declaration that " 'the remedies available in State Courts are limited to the remedies under Federal law.' " And in *Lucas Flower*, 369 U.S. at 97 n.2, the Court observed that the propriety of the state contract damages awarded "is not in issue here." At the least,

(Continued on following page)

ments advanced here against pre-emption depends on the assumption that Hechler had no contract remedy under §301—but instead suggest that the state tort claim does not offend any federal interest even if a federal post-injury contract remedy does exist—Hechler should not be estopped on remand, if the Court rejects her arguments against pre-emption, to argue for an expansive scope of her federal contract recovery. In any event, the appropriate measure of contract damages has not been addressed in this case by any court, and should await consideration below. At the least, Sally Hechler's §301 claim is not time-barred, and thus the district court erred in dismissing it on that basis.

CONCLUSION

It is respectfully submitted that the decision of the court of appeals should be affirmed. In the alternative, if the court of appeals' opinion on the pre-emption question is reversed, it is respectfully submitted that the Court should either remand the case with instructions that the district court's judgment should be reversed on the issue of the

---

Footnote continued—

therefore, the Court has left open the question of whether state law may be available to supplement the remedies provided under §301 itself. *See International Union v. Hoosier Cardinal Corp.*, 383 U.S. 696, 704-05 (1966) (state law may be borrowed as a matter of federal law); *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457 (1957) (same). *Compare Wisconsin Department of Industry v. Gould*, ... U.S. ....., 106 S. Ct. 1057, 89 L. Ed.2d 223 (1986) (under *Garmon* rule, state cannot supplement remedies available before the NLRB). If state-created damages are available, then §301 may be broad enough to encompass an action by Hechler against the Union for personal injuries caused by its negligent performance of contractual obligations.

statute of limitations, or remand the case with instructions that the court of appeals consider that issue.

Respectfully submitted,

LAW OFFICES OF
SHELDON J. SCHLESINGER, P.A.
1212 S.E. Third Avenue
Ft. Lauderdale, Florida 33316

PODHURST, ORSECK, PARKS, JOSEFSBERG,
EATON, MEADOW & OLIN, P.A.
Suite 800, City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800
Counsel for Respondent

By: JOEL S. PERWIN

October 3, 1986

Supreme Court, U.S.
FILED
JAN 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, *et al.*,
Petitioners,

v.

SALLY HECHLER,
Respondent.

On A Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF FOR PETITIONERS

LAURENCE J. COHEN
(Counsel of Record)
ELIHU I. LEIFER
RICHARD M. RESNICK
1125 15th Street, N.W.
Washington, D.C. 20005
(202) 785-9300
ALLAN M. ELSTER
17971 Biscayne Boulevard
N. Miami Beach, Florida 33110

Of Counsel:
LAURENCE GOLD
DAVID SILBERMAN
815 16th Street, N.W.
Washington, D.C. 20006

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

Page

I. INSOFAR AS PLAINTIFF'S COMPLAINT ALLEGES THAT THAT STATE LAW IMPOSES DUTIES ON LABOR UNIONS ACTING AS EXCLUSIVE BARGAINING REPRESENTATIVES AND CREATES A CAUSE OF ACTION FOR NEGLEGENT PERFORMANCE OF THOSE DUTIES THE COMPLAINT IS PREEMPTED BY THE FEDERAL DUTY OF FAIR REPRESENTATION.. 2

II. INSOFAR AS PLAINTIFF'S COMPLAINT ALLEGES THAT THE UNION NEGLIGENTLY PERFORMED REPRESENTATIONAL DUTIES ESTABLISHED BY THE COLLECTIVE BARGAINING AGREEMENT, PLAINTIFF'S COMPLAINT IS PREEMPTED BY § 301 OF THE LABOR MANAGEMENT RELATIONS ACT 11

CONCLUSION 18

TABLE OF AUTHORITIES

Cases:	Page
Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)	*passim*
Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696 (1966)	15, 16-17
Barrentive v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981)	7
Bowen v. United States Parcel Service, 459 U.S. 212 (1983)	15
Complete Auto Transit v. Reis, 451 U.S. 401 (1981)	15
Clayton v. Autoworkers, 451 U.S. 679 (1981)	15
DelCostello v. Teamsters, 462 U.S. 151 (1983)	6, 15, 16-18
Electrical Workers v. Foust, 442 U.S. 42 (1979)	7
Ford Motor Co. v. Huffman, 345 U.S. 330 (1953)	7
Franchise Tax Board v. Laborers Vacation Trust, 463 U.S. 1 (1983)	11
Golden State Transit Corp. v. Los Angeles, —— U.S. ——, 54 L.W. 4329 (April 1, 1986)	8
Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976)	10
H.K. Poter Co. v. NLRB, 397 U.S. 99 (1970)	8
Marshall v. Longshoremen's Local, 57 Cal. 2d 781, 22 Cal. Rptr. 211, 371 P.2d 987 (1962)	7
Metropolitan Life Insurance Co. v. Massachusetts, —— U.S. ——, 53 L.W. 4616 (June 3, 1985)	8, 9
Mitchell v. United Parcel Service, 451 U.S. 51 (1981)	15
NLRB v. Insurance Agents, 361 U.S. 477 (1960)	8
Plumbers & Pipefitters v. Plumbers & Pipefitters, 452 U.S. 615 (1981)	10
Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965)	15
Siler v. Louisville & N.R. Co., 213 U.S. 175 (1909)	11
Teamsters Local v. Lucas Flour Co., 369 U.S. 95 (1962)	14-15
Teamsters Union v. Oliver, 358 U.S. 293 (1959)	6

TABLE OF AUTHORITIES—Continued

Page

Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) 15
Vaca v. Sipes, 386 U.S. 171 (1967) 7, 9

Statutes. Page

Labor Management Relations Act of 1947, § 301, 29 U.S.C. § 185 ..... *passim*
National Labor Relations Act, as amended
9(a), 29 U.S.C. § 159(a) 6
§ 10(b), 29 U.S.C. § 160(b) 17-18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1360

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, *et al.*,

Petitioners,

v.

SALLY HECHLER,

Respondent.

On A Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF FOR PETITIONERS

Plaintiff-respondent Sally Hechler ("plaintiff") advances two principal arguments in her effort to avoid the force of this Court's decision in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) ("*Lueck*").

First, plaintiff attempts to take her case outside the holding of *Lueck* by remaking her lawsuit into one which is *not* based on the collective bargaining agreement between Florida Power and Light Company ("the Company") and the International Brotherhood of Electrical Workers and its Local 759 ("the Union"). Alternatively plaintiff attempts to remake the holding of *Lueck* into one that does *not* preempt all state-law causes of action which are dependent upon the provisions of a collective bargaining agreement but only such causes of action that threaten the grievance-arbitration system.

We treat with plaintiff's two arguments *seriatim*.[1]

I. INSOFAR AS PLAINTIFF'S COMPLAINT ALLEGES THAT STATE LAW IMPOSES DUTIES ON LABOR UNIONS ACTING AS EXCLUSIVE BARGAINING REPRESENTATIVES AND CREATES A CAUSE OF ACTION FOR NEGLIGENT PERFORMANCE OF THOSE DUTIES, THE COMPLAINT IS PREEMPTED BY THE FEDERAL DUTY OF FAIR REPRESENTATION

Proceeding as if this were not a real case involving an actual complaint, plaintiff conjures up a series of hypotheticals in which a union arguably "would be responsible for its representatives' negligent performance or non-performance of 'an independent, non-negotiable state imposed duty . . .'" Resp. Br. at 19; *see id.* at 16-18. Based on these hypotheticals, plaintiff contends that "the Union's duty to Sally Hechler may exist independently of its collective bargaining agreement with the Company, and may be enforced without reference to that agreement." *Id.* at 3. As we proceed to show, that contention is doubly flawed.

First, the claim that plaintiff attempts to tender to this Court is *not* the one on which plaintiff proceeded in the district court or the court of appeals, or even in opposing the petition for a writ of certiorari in this Court. To the contrary, throughout this litigation plaintiff has steadfastly maintained that her complaint *is* grounded

---

[1] Before turning to the true disagreements between the parties we note at the outset that Plaintiff attributes to us the assertion that "tort actions and contract actions in Florida are no different," and plaintiff then indignantly attacks us for a "sweeping misstatement of Florida law." Resp. Br. at 12, 14. But we never made the claim plaintiff attributes to us; all that we argued in our opening brief with respect to Florida law was that negligence in performing a contractual duty gives rise to a state contract action and a state tort action. *See* Pet. Br. at 15-16. Despite her invective, we do not understand respondent to take issue with that proposition.

in the collective bargaining agreement between the Company and the Union.

Second, the only other source of duty even mentioned in the complaint, and never again, is a duty supposedly imposed by state law on labor unions with respect to the manner in which unions represent their members in collective bargaining. Insofar as plaintiff's complaint rests on this theory, the complaint is preempted by the federal duty of fair representation and must be dismissed for that reason or because, treated as a fair-representation claim, the complaint is time-barred.

A. We begin with the text of plaintiff's complaint in this case. That complaint alleges that the Union "owed the Plaintiff the duty to assure that the Plaintiff was provided safety in her work place and a safe work place," and that the Union "breached th[is] duty and w[as] consequently negligent to your Plaintiff, SALLY HECHLER, by allowing her to be assigned to work in and allowing her to actually work in . . . a dangerous location and environment . . ." J.A. 4-5. The complaint alleges two sources for the Union's duty:

> *contracts* and agreements entered into by and between these said Defendants and the said Florida Power, to which contracts and agreements the Plaintiff was a third-party beneficiary, and . . . *the relationship* by and between the said Defendants, and the Plaintiff whereby the Plaintiff SALLY HECHLER, was a dues paying member of the said Defendants. [J. A. at 4; emphasis added]

Thus, according to her complaint, the duty "to assure . . . a safe work place"—which duty forms the gravaman of plaintiff's suit—is grounded either (a) in the collective bargaining agreement, or (b) in some body of Florida law which regulates the "relationship" between a union and the dues-paying members the union represents in collective bargaining.

In the lower courts, plaintiff abandoned the second theory and based her case *solely* on the collective bar-

gaining agreement. Thus, in opposing the Union's motion to dismiss in the district court, plaintiff stated, "The nature and scope of the duty of care owed Plaintiff is determined *by reference to the collective bargaining agreement.*" R. 98 (emphasis added). The district court, in granting the motion to dismiss, relied on plaintiff's formulation of her claim, concluding that because "the duty allegedly owed to plaintiff *flows from the collective bargaining agreement,*" it follows that "federal law controls here." Pet. App. 3a-4a (emphasis added).

In seeking reversal of the district court's ruling in the court of appeals, plaintiff continued to characterize her suit as one grounded in the labor contract. Thus, in the opening paragraph of her appellate court brief, plaintiff described her claim as follows:

> In a complaint filed in Florida state court, appellant Sally Hechler . . . brought an action in negligence against her union . . . *The complaint charged that Hechler was a third party beneficiary of agreements entered into between FP&L and both the International and Local 759* (hereinafter referred to collectively as the "Union") under which they owed Hechler "the duty to assure that the Plaintiff was provided safety in her work place and a safe work place . . . [Br. for Appellant in C.A. No. 84-5799, at 1; emphasis added.]

And in the argument portion of her brief, plaintiff acknowledged that her "complaint did allege that the Union's duty—the breach of which was common-law negligence—*was created by the collective bargaining agreement,*" but plaintiff argued that this allegation "hardly converted her complaint from a state law claim to a federal law claim." *Id.* at 45 n. 47 (emphasis added). The court of appeals agreed with plaintiff, reasoning that "[t]hough the contract may be of use in defining the scope of the duty owed," Pet. App. 21a, the state law claim nonetheless is not preempted by federal law.

Given the theory on which this case was litigated in, and decided by, both the district court and the court of appeals, it is hardly surprising that, in opposing the Union's certiorari petition in this Court, plaintiff described her complaint quite simply as a claim that "the Unions were negligent in *the performance of a contractual obligation*," Br. in Opp. at 4 (emphasis added), and plaintiff defended that claim as follows:

> *Although the contract in question admittedly defines the nature and scope of the Union's duties*, it does not, and cannot, abrogate the Union's independent state law obligation to perform those duties in a reasonable way. The contract can *define* what is reasonable, but it cannot *absolve* what it defines as unreasonable. [*Id.* at 8-9; first emphasis added.]

What *is* surprising, in light of all of the foregoing, is that plaintiff would now assert for the first time in this litigation that "the Union's duty to Sally Hechler may exist independently of its collective bargaining agreement with the Company," Resp. Br. at 3, and that "Sally Hechler's complaint raises claims which may be litigated free of any need to interpret the collective bargaining agreement," *id.* at 22.

It is, we submit, too late in the day for plaintiff to remake her lawsuit to fit a new-found legal theory. The Court, we presume, based on the decisions below and the certiorari papers, granted a writ to decide whether the states are free to regulate the manner in which a party to a collective bargaining agreement performs a duty assumed in that agreement. That is the question that should be decided.

B. Even if plaintiff were not bound by her prior statements of her claim as one for "negligen[ce] in the performance of a contractual obligation," plaintiff still would not have succeeded in stating a viable legal theory. For, as we have seen, the only other source of duty alleged in plaintiff's complaint is a supposed body of Florida law

regulating the "relationship" between a union and the dues paying members the union represents in collective bargaining and requiring unions to secure for those members, *vis-a-vis* their employer, certain safety-related employment rights.[2] And as we proceed to show, insofar as plaintiff's complaint is based on that theory, the complaint is preempted by the federal duty of fair representation.

1. As we observed in our opening brief, the duty of fair representation has been "implied under the scheme of the National Labor Relations Act," *DelCostello v. Teamsters*, 462 U.S. 151, 164 (1983), in order to place certain limits on the power that § 9(a) of that Act, 29 U.S.C. § 159(a), confers on unions acting as exclusive representative in the system of collective bargaining established by the Act. The parameters of the fair representation duty have been carefully delineated to further the "federal labor policy" whose "goal . . . is to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife." *Teamsters Union v. Oliver*, 358 U.S. 283, 295 (1959).

---

[2] The other hypotheticals about which plaintiff muses in her brief, *see* Resp. Br. at 18-19, are just that: hypotheticals. Thus, while *a* complaint "might be based upon obligations voluntarily assumed" by a union outside of the labor agreement, the *complaint in this case* is not so based; it contains no such allegation and does not remotely suggest that the Union "provide[d] . . . on-the-job-training to apprentices," "performed the function of screening job assignments for the Company" or otherwise engaged in activities that are not an integral part of its duties as an exclusive representative and that constitute a "customary practice [which] give[s] rise to a duty of care." Resp. Br. at 18. Similarly, whatever would be the fate of a complaint which alleged that "[u]nion representatives committed some positive act of negligence in connection with [a] job assignment, like recommending [the plaintiff] for the job, or negligently misrepresenting her abilities," Resp. Br. at 19, the *complaint in this case* does not allege such a basis of liability.

Given that goal, "union discretion is essential to the proper function of the collective bargaining system," *Electrical Workers v. Foust*, 442 U.S. 42, 51 (1979), as unions must be free to "balanc[e] individual and collective interests" so as to achieve "increased benefits for workers in the bargaining unit as a whole," *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 742 (1981). The duty of fair representation recognizes that cardinal principle of the collective bargaining system by "allow[ing]" a "wide range of reasonableness [to] a statutory bargaining representative in serving the unit it represents," mindful that the "complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). Thus, a "breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967).

To allow state law to add to the fair-representation duty by regulating the "relationship" between a union and those the union represents in a way that imposes state-created duties on unions with respect to the union's responsibilities *as bargaining representative* would flout the premises on which the duty of fair representation rests.[3] For if Florida were free, as plaintiff here contends, to impose on unions the duty to secure for their members "a safe work place" (p. 3 *supra*), and to hold

---

[3] We underscore the phrase "as bargaining representative" in text to emphasize the fact that unions act in a variety of *other* capacities as well, and that state regulation of union action in these other spheres would raise very different considerations. A union, for example, may be a property holder, and states are surely free to require unions to exercise due care towards invitees, including member-invitees. Cf. *Marshall v. Longshoremen's Local*, 57 Cal. 2d 781, 22 Cal. Rptr. 211, 371 P.2d 987 (1962). Our point in text is simply that when a state attempts to impose duties on a union *qua* bargaining representative, the state runs afoul of the national labor policy.

a union liable for breaching that duty even though the union has not acted in an arbitrary or discriminatory manner, unions would be stripped of the discretion in bargaining and in resolving grievances that the federal law provides and protects. Simply put, a state-imposed duty to assure a safe work place would fix the union's priorities in bargaining and in grievance processing *and preclude the union and its members, through its internal majoritarian processes, from establishing its own priorities and agenda.*

Indeed, if Florida were free to impose such a duty on unions, the state (and other states) would likewise be free to impose on unions the duty to secure other desirable rights and protections for those the union represents. The end result would be a system in which the bargaining process would be effectively controlled by state law, rather than by the private decisions of organized groups of workers. And such a result is the very antithesis of the system of *free* collective bargaining the NLRA seeks to foster. As this Court has held, Congress "intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences," *NLRB v. Insurance Agents*, 361 U.S. 477, 488 (1960); accordingly, "government may not step in and become party to the negotiations," *Golden State Transit Corp. v. Los Angeles*, —— U.S. ——, 54 L.W. 4329, 4322 (April 1, 1986). *See also H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

If Florida believes that workers should enjoy the right to a "safe workplace," Florida is free, as it has done, *see* Pet. Br. at 15, to grant that right to employees and to *impose a correlative duty on employers.* Such a state-created right and duty exist "'independent of the collective-bargaining process'" and establish a "state minimum employment standard[]," *Metropolitan Life Insurance Co. v. Massachusetts*, —— U.S. ——, 53 L.W.

4616, 4624 (June 3, 1985), that protects all employees in the state, whether those employees are organized or unorganized. The enforcement of such "independent nonnegotiable state-law rights," *Lueck, supra*, 471 U.S. at 213, in no way conflicts with the national labor policy; to the contrary, "Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public safety and health," *Metropolitan Life, supra*, 53 L.W. at 4625. But for the reasons just reviewed, Florida cannot seek to protect workers by commandeering the collective-bargaining process and converting labor unions acting as exclusive bargaining representatives into instruments of the state, obligated by state law to achieve certain contractual protections for unionized employees.

2. It was precisely for these reasons, we submit, that (as we showed in our opening brief at 26-27), the Court in *Vaca v. Sipes, supra*, held that a suit over a union's performance of its representational functions is, perforce, a fair representation suit in which "federal law governs," 366 U.S. at 174, even though, as was true in *Vacca*, the suit may happen to be pleaded as a state law claim. That holding is directly controlling here.

Plaintiff seeks to avoid the force of *Vaca* by arguing that no "federal interest" would "be served by allowing unions to be negligent in the performance of common law duties to workers which exist *independent* of the collective bargaining agreement." Resp. Br. at 37 (emphasis in original). What plaintiff fails to recognize is that, as shown above, there is a profound federal interest —the interest in a system of free collective bargaining— that would be fatally undermined by allowing the states to impose "common law duties" of a representational nature on unions. Indeed, as we have seen, the duty of fair representation only goes so far as to proscribe conduct which is "arbitrary, discriminatory or in bad faith," p. 7, *supra*, precisely because this Court, in

developing that judicially-implied duty, has recognized the importance of leaving unions free to make their own judgments—and even to make "errors in judgment," *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71 (1976)—so that the collective bargaining system can function. And given that the limitation on the fair-representation duty constitutes a considered federal judgment concerning the extent to which unions should be liable to those they represent for the unions' actions as bargaining representative it would make no sense to allow the states to ignore that judgment and to impose additional representational duties on the bargaining representative.[4]

---

[4] Of course the national labor policy is not impaired by holding a union to promises that the union chooses to make concerning the manner in which the union will perform its representational role, for such contractual actions do not impose obligations on unions by operation of law, but instead enforce obligations voluntarily assumed by a union.

Indeed, the precise point of § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, is to hold unions to the promises the unions make in collective bargaining according to a uniform federal law, and this Court has left open the question of whether § 301, or state law, is the proper legal predicate for enforcement of union promises made outside of collective bargaining, *see Plumbers & Pipefitters v. Plumbers & Pipefitters*, 452 U.S. 615, 627 n.16 (1981).

Plaintiff's extended discussion of the binding effect of union promises, *see* Resp. Br. at 39-42, is beside the point both because it is a mere reiteration of common ground and because insofar as plaintiff seeks to avoid reliance on the collective bargaining agreement, *see* p. 5, *supra*, she is attempting to use state tort law or the state law of quasi-contracts to impose representational duties on the Union *as a matter of law* in *addition* to the duties the Union has assumed in contract *as a matter of fact*.

II. INSOFAR AS PLAINTIFF'S COMPLAINT ALLEGES THAT THE UNION NEGLIGENTLY PERFORMED REPRESENTATIONAL DUTIES ESTABLISHED BY THE COLLECTIVE BARGAINING AGREEMENT, PLAINTIFF'S COMPLAINT IS PREEMPTED BY § 301 OF THE LABOR MANAGEMENT RELATIONS ACT

Although seeking to divorce her complaint from the collective bargaining agreement between the Company and the Union, plaintiff does at least acknowledge that the collective agreement provides an alternative source for the alleged duty on which her claim is based,[5] and in this regard plaintiff invokes the common-law principle that "the negligent performance of a specific contractual obigation" gives rise to a tort action, Resp. Br. at 13. Plaintiff thus contends that the states are free to create state tort remedies for the negligent performance of duties estabiished by a collective bargaining agreement. As we proceed to show, *Lueck* forecloses that contention.

1. Plaintiff's argument starts from premises with which we do not quarrel. Contrary to the position plaintiff attributes to us, we agree, of course, that the state courts are competent to apply federal law and are to be "trusted to interpret federal law correctly, subject only to the ultimate review of this Court." Resp. Br. at 25. We also recognize that "there is nothing inherently imper-

---

[5] That concession suffices to establish the propriety of removal in this case, since an action is removable if the federal courts would have original jurisdiction over that action, *see* 28 U.S.C. § 1441(b); federal jurisdiction exists where one claim in a complaint arises under federal law, *see Siler v. Louisville & N. R. Co.*, 213 U.S. 175 (1909); and as we explained in our opening brief, federal-question jurisdiction exists where "a necessary element" of a claim is a "substantial . . . question of federal law," *Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1, 13 (1983); *see* Pet. Br. at 6 n.2. Thus, contrary, to plaintiff's suggestion, *see* Resp. Br. at 29-30 n.46, there would be no need to remand this removal issue even if the Court were to "determine that Hechler's state claim is permissible in an appropriate forum."

missible" in state law creating a cause of action which "embraces"—that is, incorporates as an element of the cause—"an important federal question." *Id.* at 36.

As respondent concedes, however, such a state cause of action like one based solely on state law, is pre-empted by the Supremacy Clause where "the very existence of the state action—even if based on federal law—would 'prevent[] the accomplishment of the purposes of the federal act,'" *id.* at 31, or where "the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States," *id.* at 7, *quoting Lueck, supra*, 471 U.S. at 209. It is our submission, for reasons developed at length in our opening brief, that *Lueck* teaches that the existence of a state tort cause of action based on the breach of a collectively-bargained duty would "prevent the accomplishment of the purposes" of § 301 and is therefore preempted by that law.

2. Plaintiff argues that *Lueck* holds only that a state-law claim which is based on a collective-bargaining agreement and which would "shortcut[] grievance and arbitration procedures" and thereby contravene the federal policy of "encouragement of grievance arbitration" is preempted by § 301. Resp. Br. at 31, 10. Based on that reading of *Lueck*, plaintiff goes to great lengths to show that "permitting Hechler's action would not deter the use of the . . . dispute-resolution procedures available under federal law." *Id.* at 32; *see id.* at 32-36. But plaintiff's showing is internally inconsistent, as we explain in the margin,[6] and, moreover, beside the point because plaintiff fundamentally misunderstands *Lueck*.

---

[6] In plaintiff's view, "[i]f, *before* her injury, Sally Hechler . . . had run to state court charging that the Union had acted negligently in allowing her assignment to an unsafe job, she properly would have faced dismissal of her state action as pre-empted by the federal law," but "Hechler did not circumvent federally-sanctioned dispute resolution mechanisms by proceeding to state court after

In *Lueck* the Court stated that "[a] *final* reason for holding that Congress intended § 301 to preempt this kind of derivative tort claim is that only that result preserves the central role or arbitration in our 'system of industrial self-government.'" 471 U.S. at 219 (emphasis added). The Court offered this "final reason" only after setting forth at length the *principal* ground of decision in the case: that "the policies that animate § 301 . . . require that 'the relationships created by [a collective bargaining] agreement' be defined by application of 'an evolving federal common law grounded in national labor policy.'" *Id.* at 210-11. In accord with its entire rationale *Lueck*'s holding is stated in the following terms:

> We . . . hold that when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim or dismissed as preempted by federal labor-contract law. [*Id.* at 220.]

By its plain terms, then, the holding of *Lueck* is *not* limited to cases in which a state tort claim would "deter the use" of grievance-arbitration procedures, as plaintiff contends. Rather, *Lueck* teaches that any state-law claim which is "substantially dependent upon analysis of the terms of" a collective-bargaining agreement—that "purports to define the meaning of the contract relationship," *Lueck*, 471 U.S. at 213—is preempted by § 301.

3. Plaintiff's misreading of *Lueck* reflects a more fundamental misunderstanding of the policies underlying § 301—a misunderstanding that blinds plaintiff to

---

her injury." Resp. Br. at 33, 34-35 (emphasis in original). But the only difference between the hypothesized pre-injury suit and the present suit is the nature of the appropriate remedy, and we know of no principled basis for concluding that the preemptive force of § 301 varies with the remedy being sought. Thus, plaintiff's concession that a pre-injury suit would be preempted compels the same conclusion with respect to the instant case as well.

the fact that (to paraphrase plaintiff) "the very existence" of any state action based on collective-bargained duties necessarily "would prevent the accomplishment of the purposes" of § 301. *See* Resp. Br. at 31. That misunderstanding is most clearly manifest in plaintiff's discussion of *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95 (1962).

Lucas Flour, of course, involved an action which was plead as a state-law breach of contract claim, the contract being a collective bargaining agreement. According to plaintiff,

> [t]he holding of *Lucas Flower* [sic] is *not* that the entire state action was preempted by § 301. The holding is that state law must give way on those *aspects* of the controversy committed by 301 to a uniform interpretation under federal law. . . . By its plain language, *Lucas Flower* [sic] simply required the state court to enforce federal law where appropriate. . . . The lesson of *Lucas Flower* [sic] is that, unless it is somehow *otherwise objectionable* a state action is permissible even if it embraces issues cognizable under 301, so long as the state court applied federal law to those issues. Even the presumptive involvement of federal questions is no warrant for preemption. [Resp. Br. at 9-10; emphasis in original.]

Based on this understanding of *Lucas Flour*—and § 301—plaintiff argues that in the instant case the fact that her claim "embraces an important federal question . . . does not mean that all of the theretofore-state issues —like the amount of damages or the statute of limitations—are suddenly coverted into federal questions, which must find their source in some elusive concept of federal common law." *Id.* at 29-30.

Plaintiff's understanding of *Lucas Flour* could not be more wrong. *Lucas Flour* teaches that "the subject matter of § 301(a) 'is peculiarly one that calls for uniform law,'" and that "in enacting § 301 Congress intended

doctrines of federal law uniformly to prevail over inconsistent local rules." 369 U.S. at 103, 104. Thus, under *Lucas Flour* and its progeny, "a suit in state court alleging a violation of a provision of a labor contract must be brought under § 301 and be resolved by reference to federal law," *Lueck* 471 U.S. at 210; indeed,

> the preemptive force of § 301 is so powerful *as to displace entirely* any state cause of action "for violation of contracts between an employer and a labor organization." Any such suit is *purely a creature of federal law*, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. [*Franchise Tax Bd. v. Laborers Vacation Trust, supra*, 463 U.S. at 23; emphasis added.]

And *all* issues pertaining to the merits of such a contract suit—including issues of limitations[7] or of remediation,[8] no less than issues of contract interpretation—are to be resolved by "federal common law" which " 'the courts must fashion from the policy of our national labor laws.' " *Lueck*, 471 U.S. at 209, *quoting Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957).

It is for precisely this reason that *Lueck* holds that any state cause of action which is "substantially dependent upon analysis of the terms" of a collective bargaining agreement is preempted by § 301. For, as the Court explained in *Lueck*, questions relating to the meaning of, and legal consequences that flow from, a collective bargaining agreement

> must be resolved by reference to uniform federal law whether such questions arise in the context of a suit

---

[7] *See, e.g., Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966); *Mitchell v. United Parcel Service*, 451 U.S. 51 (1981); *DelCostello v. Teamsters*, 462 U.S. 151 (1983).

[8] *See, e.g., Bowen v. United States Parcel Service*, 459 U.S. 212 (1983); *Complete Auto Transit v. Reis*, 451 U.S. 401 (1981); *cf. Clayton v. Autoworkers*, 451 U.S. 679 (1981); *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965).

> for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by re-labeling their contract claims as claims for tortious breach of contract. [471 U.S. at 211.]

III. UNDER EITHER THEORY ALLEGED IN PLAINTIFF'S COMPLAINT, THE DISTRICT COURT PROPERLY HELD THE COMPLAINT TO BE UNTIMELY

The only remaining question is whether the district court's judgment dismissing plaintiff's complaint as untimely should be reinstated or whether, instead, this case should be remanded to the lower courts for application of federal law.

Insofar as plaintiff's claim alleges a breach of representational duties imposed on the union by operation of law, that claim is, as we have shown in Part I *supra*, necessarily a fair-representation claim. As such, this Court's decision in *DelCostello v. Teamsters*, *supra*, is directly controlling, and compels dismissal of the claim as barred by the six-month statutes of limitation *Del Costello* holds applicable to fair-representation claims.

Insofar as plaintiff's complaint concerns the union's performance of duties established by the collective bargaining agreement, the claim is, as shown in Part II, perforce a § 301 claim. Plaintiff seizes upon that fact to argue for the application of a five-year contract limitations period, claiming that *Auto Workers v. Hoosier Cardinal Corp.*, *supra*, supports that result. Plaintiff is mistaken.

Hoosier Cardinal did, of course, apply a state statute of limitations to a § 301 action. But in reaching that result, the Court stressed that

> [t]he present suit is essentially an action for damages caused by an alleged breach of an employer's obliga-

> tion embodied in a collective bargaining agreement. Such an action closely resembles an action for breach of contract cognizable at common law. *Whether other § 301 suits different from the present one might call for the application of other rules on timeliness, we are not required to decide, and we indicate no view whatsoever on that question.* [383 U.S. at 706, n.7; emphasis added]

In *DelCostello*, the Court relied, *see* 462 U.S. at 163, on this passage from *Hoosier Cardinal* to conclude that state law is *not* controlling in a 'hybrid § 301/fair representation claim," 461 U.S. at 165. The Court reasoned, in essence, that because such a suit puts at issue the manner in which a union has performed its function as bargaining representative, the suit bears a "family resemblance" to unfair labor practice claims, and the "considerations relevant to the choice of a limitations period" for such hybrid suits and for unfair labor practice claims are "closely similar". *Id.* at 170-71. Accordingly, the *DelCostello* Court held that hybrid § 301/fair representation suits are governed by the statute of limitations contained in § 10(b) of the NLRA, 29 U.S.C. § 160(b).

The instant case—whether viewed as a "pure" fair-representation case or as a § 301 case—is analytically indistinguishable from the claim in *DelCostello* and has virtually nothing in common with the type of claim that was presented in *Hoosier Cardinal.* As we showed in our opening brief (at 22-23), when all is said and done plaintiff here seeks to imply in law from the safety provision of the collective bargaining agreement certain duties on the Union with respect to the enforcement of those provisions, and plaintiff seeks to hold the Union liable for breaching those implied duties; her claim, then, as she told the district court, is that the Union wrongfully "fail[ed] to enforce provisions contained in the collective bargaining agreement," *see* Pet. Br. at 23. That was precisely the claim in *DelCostello.* And *DelCostello* teaches that the statute of limitations for claims of that type,

however such claims are framed, is § 10(b), under which statute the instant action is untimely.

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded with instructions to affirm the district court's dismissal.

Respectfully submitted,

LAURENCE J. COHEN
(Counsel of Record)
ELIHU I. LEIFER
RICHARD M. RESNICK
1125 15th Street, N.W.
Washington, D.C. 20005
(202) 785-9300
ALLAN M. ELSTER
17971 Biscayne Boulevard
N. Miami Beach, Florida 33110

Of Counsel:
LAURENCE GOLD
DAVID SILBERMAN
815 16th Street, N.W.
Washington, D.C. 20006